INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS

(COSTA RICA *v.* NICARAGUA)

VOLUME V

Rejoinder of Nicaragua;
Verbatim Records of the Hearings

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The documents relating to the case are being published in the following order:

Volume I. Application; Memorial of Costa Rica.
Volume II. Memorial of Costa Rica *(continuation)*.
Volume III. Counter-Memorial of Nicaragua; Reply of Costa Rica.
Volume IV. Reply of Costa Rica *(continuation)*; Rejoinder of Nicaragua.
Volume V. Rejoinder of Nicaragua *(continuation)*; Verbatim Records of the Hearings.

*

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The Hague, 2011.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 133 le 29 septembre 2005, a fait l'objet d'un arrêt rendu le 13 juillet 2009 (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 213).

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Volume I. Requête; mémoire du Costa Rica.
Volume II. Mémoire du Costa Rica *(suite)*.
Volume III. Contre-mémoire du Nicaragua; réplique du Costa Rica.
Volume IV. Réplique du Costa Rica *(suite)*; duplique du Nicaragua.
Volume V. Duplique du Nicaragua *(suite)*; comptes rendus d'audience.

*

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La Haye, 2011.

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DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS

(COSTA RICA V. NICARAGUA)

REJOINDER OF THE REPUBLIC OF NICARAGUA

VOLUME II

ANNEXES

15 JULY 2008

Annex 1

CONVENTION BETWEEN NICARAGUA AND COSTA RICA SUPPLEMENTAL TO THE CONVENTION OF JULY 13TH OF THIS YEAR, RELATED TO THE IMPROVEMENT OF THE COLORADO OR SAN JUAN RIVERS (RIVAS-ESQUIVEL), 21 DECEMBER 1868

Convention between Nicaragua and Costa Rica Supplemental to the Convention of July 13th of this Year, Related to the Improvement of the Colorado or San Juan Rivers

Rivas-Esquivel

1868

The Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, to conclude the preliminary Convention entered into at San José on the thirteenth of July of this year, related to the improvement of one of the two ports On the Atlantic, known as "San Juan del Norte or Greytown" and "Boca del Colorado"; and having the engineers from both Republics carried out their respective explorations and surveys, and having submitted the reports regarding the case, which have seen the public light; and to resolve as may be convenient within the spirit of the referenced Convention, the Government of Costa Rica has conferred its Full Powers to Mr. Aniceto Esquivel, Secretary of State at the Office of Foreign Affairs, and the Government of the Republic of Nicaragua, to Mr. Anselmo H. Rivas, Secretary of State of the same Government,

Who, after exchanging their respective Full Powers, found in good and due form, have agreed upon the following articles:

Article I

The Government of Costa Rica grants to the Government of Nicaragua the waters of the Colorado River, so that by diverting them from their present course, in whole or in part, and pouring them into the San Juan River, it may re-establish or improve the San Juan de Nicaragua port.

Article II

The Government of Nicaragua, on its part, commits to stipulate, in the event that any transit contract is entered into, whether with nationals or foreigners, that the freight rates established by Nicaragua for imported or exported products or merchandise shall also extend to Costa Rica, and any grace, privilege or cohesion obtained by Nicaragua, as far as transportation on the San Juan River is concerned, shall extend to Costa Rica on an equal footing.

Article III

Vessels from Costa Rica, which arrive at the San Juan del Norte port, shall not pay any duties which are not charged to the national vessels of Nicaragua.

Article IV

In the event that San Juan ceases to be a free port, and the Government of Nicaragua subjects to registration or taxation the merchandise which is imported or the products which are exported through it, the merchandise and products imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties.

Article V

If in the previous case, it were to occur that the Government of Nicaragua, as a result of any internal disorder or because it finds itself at war, could not efficiently protect the San Juan port, the Government of Costa Rica is granted the right to send the necessary force to the aforesaid port to protect the commercial interests of Costa Rica, and the Government of Nicaragua shall not concur in the cost of this provision.

Article VI

The Government of Nicaragua ratifies by this Convention the Treaties it has concluded on limits with the Government of Costa Rica; and both parties submit to arbitration of the Government of the United States of America for the settlement of any question which may arise, either regarding those treaties or the execution of this Agreement.

Article VII

This Convention shall be approved by the President of the Republic of Costa Rica and by the President of the Republic of Nicaragua, and shall also be submitted to their respective Legislative Branch for ratification, and it shall enter into force immediately after it has been ratified.

In witness whereof, both Plenipotentiaries sign in duplicate and affix their respective seals.

[Signed] A. Esquivel [Signed] A.H. Rivas

National Palace. San José, twenty-first of December of one thousand eight hundred and sixty-eight.

Finding that the foregoing Convention concurs with the conferred instructions, it is approved, and to this end, it shall be duly submitted to the Legislative Branch for ratification.

Countersigned by the
President of the Republic

A. Esquivel

Annex 2

CONVENTION ON BIODIVERSITY CONSERVATION AND PROTECTION OF PRIORITY WILD AREAS IN CENTRAL AMERICA, 5 JUNE 1992

Convention on Biodiversity Conservation and Protection of Priority Wild Areas in Central America

PREAMBLE

The Presidents of the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama,

Conscious of the need to establish regional mechanisms of economic integration and cooperation for rational use of the environment in the isthmus due to the intimate interdependence that exists between our countries;

Desirous of protecting and conserving natural regions of aesthetic interest, historical value and scientific importance that represent unique ecosystems of regional and global importance, and that have the potential to offer sustainable development options to our societies;

Affirming that conservation of biodiversity is a matter that concerns all individuals and States;

Noting that biological diversity is being seriously reduced and some species and ecosystems are threatened with extinction;

Emphasizing that the conservation of natural habitats and the maintenance of flora and fauna species must be carried out both in situ and ex situ;

Conscious of the relationship that exists between conservation and sustainable development, and reaffirming our decision to take actions for the preservation, recovery, rehabilitation and rational use of our ecosystems, including threatened flora and fauna species;

Convinced that it is necessary to promote respect for nature and law in order to improve the quality of human life in the region and promote the consolidation of peace and sustainable use and recovery of natural resources;

Highlighting that the creation, management and strengthening of Protected Areas play relevant roles in ensuring sustainable development, reproduction of essential ecological processes and rural development;

Recognizing that the Central American Commission for the Environment and Development (CCAD) is the competent body for formulating strategies and action plans that put in practice decisions for taking care of the environment;

Supporting the search for financial mechanisms that explicitly support all initiatives on the conservation of natural resources, including those in which friend countries effectively contribute; we have agreed to sign this Convention which shall be called:

CONVENTION ON BIODIVERSITY CONSERVATION AND PROTECTION OF PRIORITY WILD AREAS IN CENTRAL AMERICA

CHAPTER I

FUNDAMENTAL PRINCIPLES

Article 1. OBJECTIVE. The objective of this Convention is to ensure, as far as possible, the conservation of biological, terrestrial and coastal-marine diversity in the Central American region for the benefit of present and future generations.

Article 2. The Signatory Parties to this Convention reaffirm their sovereign right to preserve and exploit their own biological resources in accordance with their own policies and regulations regarding:

a) The conservation and sustainable use, in a social function, of their biological resources; and

b) The responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

Article 3. Conservation of biodiversity in border habitats or bodies of water requires the will of all and external cooperation, regional and global, in addition to the efforts developed by our nations, so that the international community is invited to participate, both technically and financially, in our effort.

Article 4. The fundamental requirements for conservation of biological resources are the in-situ conservation of ecosystems and natural habitats, and ex-situ measures that can be developed in each country of origin of said resources.

(...)

Article 9. DEFINITIONS. For the purpose of this regional Convention, the most important terms used in this Convention shall have the following meaning:

- **Protected Area: a geographically defined area, land or coastal-marine, which is designated or regulated and managed to achieve specific conservation objectives, that is to say, produce a series of specific goods and services (in-situ conservation).**
- **Biodiversity or Biological diversity: all the species of flora, fauna and other living organisms, their genetic variability, and the ecological complexes of which they are part.**
- **Conservation: the sustainable presentation, maintenance and rehabilitation of the elements of biological diversity.**
- **Ex-situ conservation: the conservation of the components of biological diversity (genetic material or organisms) outside of their natural habitats.**
- **Ecosystem: a complex of plant, animal and micro-organism communities and their non-living environment interacting as an ecological unit.**
- **Endangered species: any threatened or endangered species that will not survive if the causal factors continue to operate.**
- **Genetic material: any material of plant, animal, microorganism or other origin containing functional units of hereditary information.**
- **Habitat: the place where an organism or population naturally occurs.**

CHAPTER II

GENERAL OBLIGATIONS

Article 10. Each Member State of this regional framework commits to adopt, in accordance with its capabilities, national programs and priorities, all possible measures to ensure the conservation and sustainable use of biological diversity, as well as the development of the components of biological diversity in areas within each national jurisdiction, and to cooperate, as far as possible, in regional border actions.

(...)

Article 13. For the purpose of the performance of this Convention, each Member State shall:

c) Cooperate with the Central American Commission for the Environment and Development (CCAD) in the development of measures, procedures, technologies, practices and standards for the regional implementation of this Convention.

d) Implement economic and legal measures to promote sustainable use and development of the components of biological diversity.

e) Ensure the adoption of measures that contribute to the conservation of natural habitats and their populations of natural species.

f) Provide, individually or in cooperation with other States and international organizations, new and additional funds to support the implementation of national and regional programs and activities related to conservation of biological diversity.

g) Promote and support scientific research at national universities and regional research centers, in conjunction with interested international organizations.

h) Promote public awareness in each country with respect to the necessity of conserving, making sustainable use and developing the biological wealth of the region.

i) Facilitate information exchanges amongst national institutions, the Central American countries and other international organizations.

CHAPTER III
MEASURES FOR EXECUTION

Article 14. Each Member State shall develop its own conservation and development strategies, amongst which the conservation of biological diversity and the establishment and management of protected areas shall be a priority.

Article 15. Each Member State shall integrate, as quickly as possible an appropriate, the conservation and sustainable use of biological resources in the relevant policies and programs of other sectors.

Article 16. The elaboration of a national law on conservation and sustainable use of the components of biological diversity shall be promoted in each country of Central America.

Article 17. Relevant institutions in each Member State shall identify, select, create, manage and strengthen, as early as possible, national parks, natural and cultural monuments, wildlife refuges or other protected areas, which shall serve as instruments to guarantee the conservation of representative samples of the main ecosystems of the isthmus, prioritizing those that contain high water-yielding forests.

Article 18. This Convention prioritizes the development and strengthening of border protected areas in the following terrestrial and coastal regions:

- Maya Biosphere Reserve
- Fraternidad or Trifinio Biosphere Reserve
- Gulf of Honduras
- Gulf of Fonseca
- Coco River or Solidaridad Reserve
- Miskito Keys
- International System of Protected Areas for Peace (SIAPAZ)
- Salinas Bay Reserve
- La Amistad Biosphere Reserve
- Sixaola Reserve
- Darien Region

(...)

Article 24. Mechanisms shall be established to control or eradicate those alien species that threaten ecosystems, habitats and wildlife species.

Article 25. Greater efforts shall be developed so that each State of the region ratify as early as possible the Convention on International Trade in Endangered Species (CITES), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR) and UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage, providing all guarantees for internal compliance.

(...)

CHAPTER IV
GENERAL PROVISIONS

Article 39. RATIFICATION. This Convention shall be subject to ratification by the Member States in accordance with the internal norms of each State.

Article 40. ACCESSION. This Convention shall be open for accession by the Member States of the Mesoamerican region.

Article 41. DEPOSITARY. The instruments of ratification or accession and withdrawals from this Convention and its amendments shall be deposited with the Ministry of Foreign Affairs of the Republic of Guatemala, which shall send a certified copy to the Foreign Ministries of the other Member States.

Article 42. ENTRY INTO FORCE. For the first three depositing States, this Convention shall enter into force on the eighth day after the date of deposit of the third instrument of ratification, and for the other signatory or accessioning States, on the date of deposit of their respective instruments.

Article 43. REGISTRATION. Upon the entry into force of this Convention and its amendments, the Foreign Ministry of Guatemala shall send a certified copy to the Secretary General of the United Nations for registration as provided in Article 102 of the UN Charter.

Article 44. TERM. The term of this Convention shall be ten years counted from the date of entry into force and shall be renewed for consecutive ten-year terms.

Article 45. WITHDRAWALS. Any Member State may withdraw from this Convention. The withdrawal shall take effect upon expiry of six months its deposit, and the Convention shall remain in force for the other States provided that at least three States remain adhered to it.

Done at the celebration of the International Day of the Environment on the fifth of June of 1992 during the XII Central American Presidential Summit in Managua, Republic of Nicaragua.

Annex 3

INTER-INSTITUTIONAL CONVENTION FOR ENVIRONMENTAL CONSERVATION AND THE SUSTAINABLE USE OF NATURAL RESOURCES SIGNED BETWEEN THE MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES AND THE SANDINISTA PEOPLE'S ARMY.

29 MARCH 1995

INTER-INSTITUTIONAL CONVENTION FOR ENVIRONMENTAL CONSERVATION AND THE SUSTAINABLE USE OF NATURAL RESOURCES

SIGNED BETWEEN THE MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES AND THE SANDINISTA PEOPLE'S ARMY

We, the undersigned, Mr. Milton Caldera Cardenal, on behalf of the Ministry of the Environment and Natural Resources, and Army General Joaquín Cuadra Lacayo, on behalf of the Sandinista People's Army:

(...)

The Ministry of the Environment and Natural Resources (MARENA), for its part and within the general terms of this convention, specifically commits to the following:

1.- To appoint an entity for coordination and communication with the Sandinista People's Army. To do so, the Ministry confers said appointment permanently to its Vice Minister.

2.- To provide with due prior notice the information necessary for the optimal planning and development of actions to be requested of the other Institution.

3.- To facilitate MARENA installations when the Sandinista People's Army transfers Units to areas that require protection, with prior coordination with the same.

4.- To assign specialized personnel to provide training on environmental topics and natural resource conservation within the regular academic programs for Officers and Classes of the Sandinista People's Army.

5.- To provide the necessary technical training to military personnel who participate in specific ecological missions, supporting the EPS [Sandinista People's Army] in general when so requested with the integral education of Leaders and Officers.

6.- To ensure budgetary support to provide personnel with the technical means and other resources required to comply with any functions proposed for the EPS that exceed the Armed Institution's own assigned resources.

For its part, the Sandinista People's Army commits specifically to the following:

1.- To appoint a member of the General Staff to establish coordination and communication with MARENA.

2.- To include a broad program related to Environmental preservation and the sustainable use of Natural Resources within the Instruction and training plans for Officers, Classes and Soldiers.

3.- To include ecological activities within the institution's annual planning, to be implemented in a coordinated manner with MARENA.

4.- To pay special attention to protected areas and the projects of greater importance implemented within them: SI-A-PAZ, CAYOS MISKITOS, COSIGÜINA, BOSAWAS and VOLCAN MASAYA; SEA TURTLE PROTECTION AND CONSERVATION; PLAN TO CONTROL AND PROTECT THE CLOSED HUNTING SEASON FOR LOBSTER AND SHRIMP SPECIES IN ATLANTIC WATERS; PROTECTION OF FOREST, MANGROVE AND MARINE FAUNA (SHRIMP LARVAE) RESOURCES.

5.- To present, in coordination with MARENA, the necessary suggestions referring to the coordination of measures to be implemented with military authorities from bordering countries, with the objective that the Ministry of Foreign Affairs prepare the necessary documents or agreements for signing with the respective Governments.

6.- To support programs and control actions against the illegal activities of traders and smugglers of land and aquatic flora and fauna, pursuant to the Protocol signed with the World Society for the Protection of Animals (WSPA) and to the Convention on International Trade in Endangered Species (CITES).

7.- To support a program to control the illegal felling of trees throughout the national territory, and to become involved in the analysis of possible solutions to the destruction of forests caused by the advance of the agricultural frontier.

8.- To support MARENA and Communities, upon request, in actions involving reforestation, environmental recovery, fire fighting and any other activity related to these general stated objectives and over which agreements are made.

Both institutions commit jointly to the following:

1.- To prepare annual plans and summaries in order to combine efforts, resources and knowledge to contribute to environmental protection and conservation and the sustainable use of natural resources. To evaluate the effectiveness and efficiency of executed plans, for their divulgation through the media.

2.- To adopt joint measures seeking to prevent illicit exploitation of natural resources and negative effects on the environment. To confront jointly the conflicts derived from the completion of these functions.

3.- To prepare territorial conventions between communities and MARENA and EPS Delegates.

4.- To create mechanisms for the control and monitoring of the points referred to in this convention. To coordinate in the future with the National Environmental Information and Surveillance System, which will be established in accordance with Article 2, Number 6 of Law 1-94.

5.- To seek resources with which to carry out the proposed tasks.

6.- To invite other state Institutions and the population to join the efforts that both institutions have been making for many years and that today are being detailed in this Convention.

7.- In the event of noncompliance by either of the parties, both commit to meeting immediately, with the contracted responsibilities and obligations remaining suspended until a reasonable agreement is reached. Upon request by either of the parties, proposals for changes to this agreement will be analyzed.

In witness whereof, we hereby sign two identical copies, on 29 March 1995.

[Signature]	*[Signature]*
MR. MILTON CALDERA CARDENAL **MINISTER** **MARENA**	**ARMY GENERAL** **JOAQUIN CUADRA LACAYO** **COMMANDER-IN-CHIEF OF** **THE SANDINISTA PEOPLE'S ARMY**
[Stamp]	*[Stamp]*

Annex 4

FINAL MINUTES FROM THE IV BINATIONAL MEETING NICARAGUA-COSTA RICA, 13 MAY 1997

FINAL MINUTES FROM THE IV BINATIONAL MEETING NICARAGUA-COSTA RICA

The IV Meeting of the Binational Nicaragua-Costa Rica Commission celebrated in the City of Granada, Republic of Nicaragua, on the 12 and 13 of May 1997, counted with the participation of high-level government officials from the governmental institutions involved in the development of the border areas, it evolved in an environment of Central American fraternity that allowed an ample exchange of opinions over the issues of interest that conform the bilateral agenda, on which the various Sub-Commissions reached important agreements.

The meeting was presided over by the Ministers of Foreign Affairs, and counted with the participation of delegations from the Legislative Branches and representatives from local authorities from the bordering communities from both countries, which contributed to reaching a more integral perspective over the various issues addressed. The meeting had the honor of being closed by The Honorable Presidents from both countries.

(...)

The agreements reached by the various working groups are the following:

I. SUBCOMMISSION ON SECURITY AND IMMIGRATION AFFAIRS

I. IMMIGRATION AFFAIRS AND MIGRANT LABOR

(...)

II. BORDER SECURITY

(...)

c) Drug Trafficking

Faced with the problem presented by the Costa Rican delegation regarding the existence of sites that require the presence of authorities with competency in this matter, it was agreed that Nicaragua will make efforts to establish posts at determined sites, so as to extend coverage in the fight against this crime.

In addition, the parties agreed on the need to strengthen the exchange of information and to coordinate determined operations to fight this crime.

With respect to the movement of vessels, it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case, the posts at San Juan del Norte, San Carlos and Sarapiquí.

Annex 5

ARGUMENT ON THE QUESTION OF THE VALIDITY OF THE TREATY OF LIMITS BETWEEN COSTA RICA AND NICARAGUA, AND OTHER SUPPLEMENTARY POINTS CONNECTED WITH IT, SUBMITTED TO THE ARBITRATION OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, FILED ON BEHALF OF THE GOVERNMENT OF COSTA RICA, WASHINGTON: GIBSON BROS., 1887 (EXTRACTS)

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(...)

In 1846 Costa Rica had to pass through an exceptional crisis. Coffee, its principal export product, had experienced remarkable depreciation in the foreign markets, and could not stand competition, owing to the high freight that it had to pay when carried by the way of Cape Horn. It was of vital importance, and worthy of any sacrifice whatever, to have a passage open to the Northern Sea, that is, the Atlantic Ocean. The old port of Matina could not answer the purpose, owing to insuperable obstacles, and no recourse was left except making the exports through San Juan del Norte.

As shown before, Costa Rica had always had a perfect and indisputable right of joint ownership in the San Juan river; but, as the harbor and bay were then occupied by Nicaragua, Costa Rica decided to make an effort, and seek for a settlement, which, setting aside interminable discussions, would enable its Government to carry into effect the purpose above referred to. To this end it sent to Nicaragua Senores Madriz and Escalante, with such instructions as proper, to treat with her Government.

The pretensions of Nicaragua were so exorbitant that neither the Government nor the Congress of Costa Rica, in spite of their determination to yield all that was practicable 'for the sake of obtaining an immediate adjustment, could approve of the arrangements made. Then: it was when Nicaragua, for the first time, carried her territorial pretensions on the side of the San Juan river as far as the neighborhood of Matina, and when she suggested, as a compromise, that the territory between Matina and the San Juan river should be divided equally between both countries. She demanded besides a tribute to be paid to her for the transit of Costa Rican merchandise through the San Juan river!

In 1848, the Government of Costa Rica made another attempt to obtain from Nicaragua an equitable settlement, and accredited to her a Legation which it entrusted to Licenciate.

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THIRD PART.

ANSWER TO THE QUESTIONS PROPOUNDED BY NICARAGUA IN REGARD TO THE RIGHT CONSTRUCTION OF THE TREATY OF LIMITS.

CHAPTER I.

WHETHER THE STARTING-POINT OF THE BORDER LINE IS MOVABLE AS THE WATERS OF THE RIVER, OR WHETHER THE COLORADO RIVER IS THE LIMIT OF NICARAGUA, AND WHETHER THE WATERS OF THE SAN JUAN RIVER CAN BE DEVIATED WITHOUT THE CONSENT OF COSTA RICA.

IN compliance with Article VI of the Convention of Arbitration concluded at Guatemala, and by telegram received at the city of San Jose, of Costa Rica, on the 23d of June ultimo, the Government of Nicaragua communicated with the Government of Costa Rica the eleven questions or points which the former considers to be of doubtful interpretation, and which are to be submitted additionally to the decision of the Arbitrator.

For Costa Rica there is not one single point in the treaty of limits which is not perfectly clear and intelligible, or the interpretation of which admits of any doubt. For this reason I do not submit to the consideration of the Arbitrator any question relative to this point, and shall have to confine myself to answer those which the Government of Nicaragua has propounded, and dispel any doubt which might arise therefrom.

But while it is true that the treaty is clear, it is also true that the doubts propounded by Nicaragua exhibit such subtlety and ambiguity as scarcely can be found elsewhere…

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But the best proof which can be given of the fact that the doctrine herein held by me is the only legitimate and correct one will be found in the explicit sanction which Nicaragua herself has given to it.

By Article VIII of the treaty of limits of 1858 it was stipulated that, before entering into any contract of canalization or transit, Costa Rica should be consulted ; and the reason of this provision was, as plainly stated in Article VIII, because of the " disadvantages that the transaction might produce " for Costa Rica. This was proper and just, as, also, was the stipulation that the opinion of Costa Rica should not be merely advisory and consultative, but an actual vote, when the disadvantages alluded to were such as "to injure" the natural rights of Costa Rica.

Natural rights, disadvantages, injury, necessity of consultation, the right of veto, if such can be said, have been acknowledged ; and all of this means that Costa Rica has a perfect and indisputable right to oppose the deviation of the course of the San Juan river.

If Costa Rica has this right when the work to be done refers exclusively to canalization and transit, how can it be denied when the work to be done is the radical one of carrying the river elsewhere, and depriving Costa Rica of the long river front which she now enjoys?

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CHAPTER II.

WHETHER, MEN-OF-WAR OR REVENUE CUTTERS OF COSTA RICA CAN NAVIGATE ON THE SAN JUAN RIVER.

BY the necessity of system, and following the plan initiated, I must now pass to occupy myself with question No. 8, propounded by Nicaragua.
This question reads as follows:

"Eight.

"If Costa Rica, who, according to Article VI of the treaty, has only the right of free navigation for the purposes of commerce in the waters of the San Juan river, can also navigate with men-of-war or revenue cutters in the same waters?"

In order that the language be precise, and that the meaning of the compact should not be modified by the introduction of a word, I must begin by calling the attention of the arbitrator to the fact that the word only which occurs in the question does not occur in Article VI of the treaty of limits.

That article simply reads in this way:

"But the Republic of Costa Rica shall have in the said waters the perpetual rights of navigation, from the above said mouth up to a point three English miles distant from Castillo Viejo, for the purposes of commerce, either with Nicaragua or with the interior of Costa Rica," &c.

Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?

The answer seems to be very simple, especially when the

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fact is taken into consideration that, under no circumstances whatever, even in case of war, acts of hostility can be done by either of the two Republics against the other in the waters of the river, or of the Lake of Nicaragua, or the Bay of San Juan.

It seems to be beyond discussion that Costa Rica can navigate in the San Juan river with public vessels, which are not properly men-of-war.

It was stipulated in the treaty, to the benefit of Nicaragua, that Nicaraguan vessels could bring their cargoes to the Costa Rican bank of the river and unload them there; and this permission, or right, presupposes, necessarily, the correlative right of Costa Rica to watch its own banks by the only practicable means, which is the revenue police, during the whole course of the river navigable for Costa Rica.

If this only means of vigilance would not be permitted, the Costa Rican commerce would be deprived of protection and at the mercy of smuggling.

Within the meaning of the words, commercial navigation, both the revenue police, the carrying of the mails, and all other public services of the same kind are necessarily included.

In regard to men-of-war, there is no reason why they cannot be admitted upon the waters of the San Juan river.

Carlos Calvo, in his work already cited, Book IV, § 230, says the following : * * * "In principle, a port of free entry is considered tacitly as one accessible to the men-of-war of all nations, and, unless stipulated to the contrary, the free access granted to all merchant vessels is extended to war vessels of the friendly nations. This is a point upon which all writers of public law fully agree."

By analogy, this doctrine can be perfectly well applied to the navigable rivers; and if all the friendly nations have the right to navigate with men-of-war in the large rivers, why can the right of Costa Rica to do the same thing on the San Juan river be disputed by Nicaragua, who is separated from

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Costa Rica might claim the same privilege granted to the three above-named nations, because, under Article IV of the treaty of August 14, 1868, between Nicaragua and Costa Rica, it was provided that everything granted to any nation whatsoever by either contracting party must be at once understood to be common to the other. This stipulation would give Costa Rica the right to place on the waters of the San Juan river, in the event foreseen, and for the purposes had in view by these treaties, all kinds of men-of-war.

But there is, after all, a fundamental consideration which is perplexing, not, certainly, on account of the decision to be given to the point in question, but owing to the difficulty of understanding how the Government of Nicaragua could ever consider this point of the treaty of limits of 1858 to be doubtful and admit of different interpretations.

All that I have said in this portion of my work in explanation of the facts and law which relate to the subject might be erroneous, badly brought, irrelevant, and absolutely inadmissible on general principles, and, nevertheless, it would be trite that Costa Rica can navigate with men-of-war and other Government vessels on the waters of the San Juan river. It is Nicaragua herself who has solemnly granted that right by an article of that very same treaty which she alleges to be doubtful or capable of different interpretation.

"Costa Rica shall also be bound," says the second part of Article IV of the treaty, "owing to the portion of the right bank of the San Juan river, which belongs to it, * * * to co-operate in its custody; and the two Republics shall equally concur in its defence in case of foreign aggressions; and this will be done by them with all the efficiency that may be within their reach."

It can be seen by these phrases, as plainly and transparently as they can be, that Costa Rica has not only the right but the duty, or to follow exactly the language of the treaty, the "obligation," not only of watching, guarding, and defending its own river bank, but of contributing to the custody and defence of the other bank belonging to Nicaragua.

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If that duty should not be complied with with all the efficiency within the reach of Costa Rica, the latter nation would violate an obligation contracted in a solemn treaty, and Nicaragua might prefer against Costa Rica a well-grounded charge. And if this is the case, how can it be possible for Nicaragua to suppose that Costa Rica has no authority to navigate in the said river with Government vessels to be used in the police service of the locality, and in the custody of the two banks, and with regular men-of-war to be used in the defence, as efficient as possible, of the same banks in case of foreign aggressions?

No one can accomplish a purpose, unless he has the means to do it; and it would be against logic and reason to impose upon, either a man or a government, the duty of guarding and defending a place, and at the same time deprive the one or the other of the right of arming or preparing themselves for resisting in the proper manner the aggression foreseen.

"The right to a thing," says Wheaton, "gives also the right to the means without which that thing cannot be used." (Part III, chap. IV, § 18). "This is founded on natural reason, is accredited by the common opinion of mankind, and is declared by the writers."

Let it not be said that the authority to navigate with men-of-war is only confined to the special case of foreign aggression. The treaty does not refer to this case exclusively, but speaks also of guard or custody, which means watching, vigilance, and other things of permanent character and necessarily previous to actual defence. This, especially in a river, cannot be improvised at the very same instant that trouble arises; since, in order that it may be possible and efficient, a perfect knowledge of the locality, which cannot be acquired except by navigating the same river, is absolutely indispensable.

Much more so when it is well known that the navigation of the San Juan river encounters many obstacles, not only on account of its shallowness at certain places, but also owing

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to its rapids and other dangers. The defence of a river of this kind, without practical knowledge of all its peculiarities, rather than defence would be a sure surrender to the enemy of the elements brought into action to oppose it.

Let it not be claimed either that Costa Rica is relieved from the duty assumed by her of guarding and defending the river, nor that such duty has ceased or been abridged through the fact that Nicaragua denies to her the right to navigate said river with men-of-war ; because the navigation of the San Juan river, which is the boundary between Costa Rica and Nicaragua, and is a boundary open and accessible to invasions by all kinds of enemies, was mentioned in the treaty, not simply for the benefit of Nicaragua, and as an obligation on the part of Costa Rica, but because it involves also a sacred right of the most vital importance for its safety and preservation.

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No. 27

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The attention of the government of Nicaragua has been forcibly called to the condition of the port of San Juan del Norte, which has been filled up and almost rendered useless on account of the sand which has accumulated in it ever since its waters have abundantly flowed into the channel of the Colorado river; and such a state of things must also demand the attention of Costa Rica, because the interest of the latter in this subject is not less felt, since by existing treaties she has the right of navigation and free import from there.

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No. 32.

The Government of Nicaragua asks for some forces to be situated at Sarapaquí (a confluent of the San Juan river, on the right bank).

GOVERNMENT HOUSE,

GRANADA, April 23, 1863.

Mr. MINISTER : Mr. Felix Belly, who has recommended himself so much by reason of his ,former action in Central America, has submitted to this Government a project of inter-oceanic transit and steam navigation in the interior of the Republic, an authorized copy of which I have the honor to enclose to you, for the purposes of Article VIII of the treaty of April 15, 1858.

With reference to your estimable Dispatch of the 1st instant, relative to the difficulties that lately arose between the Government and the Central American Transit Co., I must inform you, for the knowledge of your Government, that two agents of the said company, duly authorized by it to revalidate the contract which the Government had declared to be void, have just arrived in this city. Up to this date the Government has not deemed it advisable to listen officially to the proposals that they have come to make, its reasons to do so being, 1st, that they have not yet paid the sums due to this Republic as tolls for passengers ; and, 2d, because the Government thinks that, if not all, some, at least, of the officers of the company are accessories to the piratical and filibuster outrage perpetrated on the 7th instant at the La Virgen Bay, on board the steamer San Juan, unfortunately in connivance with forces of Honduras and Salvador ; but, as in the difficult situation in which Nicaragua finds herself at present it is possible for the company to do some violence to the rights of this Republic, the Government may perhaps be compelled by pure necessity to enter with it into some equitable arrangement of temporary character, but by no

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I do not think it to be inopportune in view of the current events to recommend to you and the Supreme Government of your country to cause some forces to be stationed at Sarapiqui to meet on that side any emergency that the same events might occasion there.

I take advantage of this opportunity to reiterate to you the just considerations with which I subscribe myself, your very attentive and obedient servant,

EDUARDO CASTILLO.

To the Hon. THE MINISTER OF FOREIGN RELATIONS of
the Supreme Government of Costa Rica.

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No. 38.

The Minister of Nicaragua in Washington solemnly declares -before the American Government that the Republic of Costa Rica borders on the interior waters of Nicaragua, and that its flag is the only one which, in union with the Nicaraguan flag, can float on said waters.

LEGATION OF NICARAGUA,
WASHINGTON, Oct. 7, 1863.

MOST EXCELLENT SIR:

On the other hand, I can assure Your Excellency that the present administration of Nicaragua DOES NOT FEEL DISPOSED TO CONSENT THAT ANY OTHER FLAG, EXCEPT HER OWN AND THAT OF COSTA RICA, AS A BORDERING STATE, SHOULD FLOAT IN THE NAVIGATION OF HER INTERIOR WATERS, and that it considers that the use of the flag of the United States made by the Central American Transit Company, and even by the meanest laborers of the same, for the purpose of evading the orders and escaping the authority of Nicaragua, is an unauthorized abuse, and that, it being persuaded that such an abuse can only produce complications, it will maintain its right, and will demand from the said company, or from any other company owing its existence to it, that it should root itself in the country and become, therefore, nationalized, according to the law of nations, and use pre-eminently the national flag, whenever one should be required within its jurisdiction, no other flag being admitted, except under exceptional circumstances and through courtesy.

LUIS MOLINA.

To His Excellency WILLIAM H. SEWARD,
c&c., c&c., &c., Washington, D. C.

[From "La Gaceta" of Nicaragua, No. 49, January 16, 1864.]

Annex 6

REPLY TO THE ARGUMENT OF NICARAGUA ON THE QUESTION OF THE VALIDITY OR NULLITY OF THE TREATY OF LIMITS OF APRIL 15, 1858, TO BE DECIDED BY THE PRESIDENT OF THE UNITED STATE OF AMERICA, AS ARBITRATOR, FILED ON BEHALF OF THE GOVERNMENT OF COSTA RICA, WASHINGTON: GIBSON BROS., 1887 (EXTRACTS)

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No. 55.

The exportation through *San Juan de Nicaragua of the natural products of the public lands of Costa Rica, such as timber, sarsaparilla, rubber, baisams, resin, &c., is prohibited, in order to prevent the natural wealth of the northern section of Me Republic from being destroyed.*[1]

JESUS JIMENEZ,

Provisional President of the Republic of Costa Rica:

In order to prevent the valuable natural productions of the public lands on the Atlantic side from being destroyed, and also to repress smuggling and protect lawful commerce, I do hereby decree:

ARTICLE 1. The exportation THROUGH SAN *JUAN DE* NICARAGUA OF TIMBER, SARSAPARILLA, RUBBER, BALSAMS, RESINS, AND ALL OTHER NATURAL PRODUCTS OUT, OR EXTRACTED, OR COLLECTED, IN THE FORESTS SITU &TED ON THE PUBLIC LANDS OF THE REPUBLIC BETWEEN THE ANDES AND THE ATLANTIC, is hereby prohibited, unless under previous authority given by the Judge of the Treasury and by virtue of a contract entered into with the Government by proposals and bids. All works undertaken in the said locality for the purpose of exporting the said products in the manner aforesaid are also prohibited.

ARTICLE 2. Whoever shall violate the provisions of the foregoing Article shall lose the cargo so attempted to be carried and shall be fined one hundred dollars, or, in default of payment, if the person has not sufficient property within the Republic to pay that amount, he shall suffer three months of imprisonment at hard labor.

ARTICLE 3. REVENUE POSTS SHALL BE ESTABLISHED *IN* EVERY PLACE OF OONFLUICNOE OF THE SAN CIRLOS AND SARAPIQUI RIVERS WITH THE SAN JUAN. Each one of these posts shall be commanded by a corporal, who shall have three privates under him; but the number of the latter shall be increased if the necessities of the service require it. The corporals shall be paid fifty dollars and the guards thirty-five dollars per month each.

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[1] This decree was the first germ of the idea of repudiating the treaty of 1851.

ARTICLE 4. It shall be the duty of these posts, 1st. To prevent the exportation of the natural products of the public lands of the Republic, and their being worked or obtained for that purpose. 2d. To seize those products already cut down, collected or extracted, and send them whenever possible and convenient, together with the arrested transgressors, to the nearest authority in order that the latter may cause the preliminary investigation to be made and submit the record thereof, together with the prisoners, to the court which must pass sentence. 3d. To seize every article the trade of which the Government has reserved for itself and those whose importation is forbidden, if attempted to be introduced into the Republic, and send them, together with the prisoners, to the nearest authority, in the manner and for the purposes above named. And 4th. To watch that no articles of lawful commerce are introduced into the country without the formalities prescribed by this decree; to detain those which may be attempted to be introduced clandestinely and fraudulently; and to report without loss of time to the proper officer, who must declare them forfeited.

* * * *

Article 16. Whoever shall be arrested while making or assisting in the exportation of the natural products aforesaid without the proper authority and without paying the duties established, shall be punished according to the provisions of Article 2 of the present decree; but if it should be found out that he has already made *the* exportation then he shall have to pay a double fine or to undergo double time in prison at hard labor, whatever the nature and quantity of the exported articles may be.

Given at the National Palace at San Jose on April 28, 1869.

JESUS JIMENEZ.
JUAN RAFAEL MATA, *Secretary of the Treasury.*

Annex 7

INSTRUCTIONS CARRIED BY THE SPECIAL MINISTER APPOINTED TO THE GOVERNMENT OF NICARAGUA, MR. FRANCISCO MARÍA OREAMUNO'S DIPLOMATIC MISSION TO NICARAGUA, 1838

Mr. Francisco María Oreamuno's Diplomatic Mission to Nicaragua in 1838[1]

Instructions carried by the special Minister appointed to the Government of Nicaragua.

1st Celebrating an express and mutual recognition of both States' independence, sovereignty and liberty, perpetually delimiting their territory dividing line and providing for the mutual exchange of defendants and Treasury debtors, regardless of their nature and residence, who are claimed by the competent authority.

2nd Celebrating, as a result, the closest friendship between Nicaragua and Costa Rica and pledging mutual defense of their reciprocal independence, sovereignty, and liberty, specifying the relief supplies to be provided by sea and land, in the case of being invaded by foreigners or by any other States of the Republic, or by any person trying to depress such rights by force and under nationality denomination or character.

3rd Establishing the obligation of actively cooperating in the creation of your general government, preserving and sustaining it, contributing to its expenses with a proportional allotment, and recognizing the national debt and also contributing to its amortization in a proportional manner.

4th Establishing principles to help each other when legitimate respective authorities are disowned or attacked by internal factions.

5th Requesting the cooperation of the Government of Nicaragua for the diocesan chapter to authorize a capitular vicar in the spiritual jurisdiction of Costa Rica, with the same powers possessed by the Nicaraguan vicar and reporting only to said chapter; and for the chapter to give its express consent concerning the diocese division, specifying the involvement this Government should have in appointing clergymen and capitulars while the bishopry for Costa Rica is provided.

6th Establishing both States' reciprocal obligation of fixing the main road leading from one to the other to their respective borders, without levying traffic on it.

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[1] National Archives, S. A. Series I, N° 5708, F. 42 v.

7th Since a tobacco contract was entered into by that Government and this one in the year 1823, according to which the former still owes a certain amount, he will previously settle the account and through the corresponding installments will collect the remainder.

8th He will similarly claim the indigenous community funds belonging to this State and existing in times of the Spanish Government at the Nicaraguan Government's general treasury.

9th He will also claim the rural farm and urban sales taxes, which, located in this State and sold by neighbors and residents of that one, have been paid there.

10th He will additionally ask for payment of obligations the late Pedro Muñoz and his creditors assumed in the State of Nicaragua upon Nicoya district tithe auction sales, in the three-year period elapsed after its annexation to Costa Rica.

11th Similarly, he will ask for the armament which former Chief Cerda took away in the year 27 from the Costa Rican division that was returning from the national army, along with gear it was bringing, or otherwise he will determine an indemnity payment.

12th After these debts have been acknowledged, the Minister may grant terms for repayment of the amount owed to this State by the Nicaraguan State on account of the tobacco contract entered into in the year 23, the indigenous communities, and the indemnity for the armament taken away in Managua.

13th He will also be able to compromise and conform in reference to the late Pedro Muñoz's debt, resulting from Nicoya district tithe auction sales, referred to in the tenth paragraph of these instructions, and by the sales taxes paid so far, as mentioned in the ninth instruction.

14th He will ask for new instructions on any new incidents or propositions on matters not covered in the preceding articles, providing extensive information on related issues.

15th Concerning the treaties he enters into, the Minister will not leave until he receives their ratification or reforms for him to stipulate them, unless an unforeseen and very dangerous event forces him to leave before completing his mission, in which case he will render account through an express dispatch: and if unfortunately he should become sick and seriously ill, he will pass on these

instructions and the files documenting them to the secretary, who shall keep them while expecting orders before returning.

16th In all businesses concerning the mission, the secretary will authorize communications with the Government of Nicaragua and with this one. He will also authorize the treaties, pacts, or agreements entered into.

17th He will set down Costa Rica's freedom to navigate on the San Juan River and its freedom from export duties on its fruits leaving through the same river, since its territory contains the Sarapiquí River, the water of which increases the San Juan River flow. If necessary, this covenant shall include the prohibition of introducing foreign goods or merchandise to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs; and a fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, providing exports are done freely.

Given in the city of San José, on the twenty sixth day of the month of July, eighteen hundred and thirty eight.

(Signature of Mr. Braulio Carrillo, Chief of State)

Annex 8

"PROTOCOL OF THE CONFERENCE OF 10 JANUARY 1854",
IN ESGUEVA, ANTONIO, *THE BORDERS OF NICARAGUA AND COSTA RICA IN THE HISTORICAL DOCUMENTS*,
MANAGUA: IHNCA-UCA, 2007, PP. 336-337,
DOCUMENT NO. 132A

1854

Protocol of Conferences between the Plenipotentiaries of Costa Rica and Nicaragua

In the city of San Jose, on the tenth day of January of one thousand eight hundred fifty-four, a meeting was held by the Plenipotentiaries of the Republics of Costa Rica and Nicaragua: the first between the Ministers of Foreign Affairs and Treasury, Messrs. Don Joaquín Bernardo Calvo and Don Manuel Jose Carazo; and the second between Don Dionisio Chamorro, with the important objective of dealing with matters of great interest for both Republics, who, having communicated to one another their respective powers and reciprocally finding them in good and due order, and consequently, the Plenipotentiary Minister of Nicaragua stated as follows:

That his Government, being desirous of removing the powerful reason that unfortunately exists at the present time, which could alter peace and good relations existing between the Republics of Nicaragua and Costa Rica, has deemed it convenient to resolve or settle the issue of territorial limits pending between the two countries as follows:

The Government of Nicaragua cedes to that of Costa Rica what was called "District of Nicoya", and now, Province of Guanacaste, giving up from this date and forever the rights it has or believes it has to said Party or Province; it being understood that the dividing line between that Province and the Department of Rivas, or better yet, between Costa Rica and Nicaragua, is a straight line drawn as follows: commencing from the most salient point of the Promontory called "Descartes", continuing along the south shore of said point in an easterly direction, after separating from the sea, along the shortest line up to the "Refugio" river, at a distance of two leagues from its mouth in the Lake of Nicaragua; and from there, following a line parallel to the shore of the Lake until it reaches the "Frio" river, from where it rises six leagues up to the river course: from this point, changing direction, it will follow a line parallel to the "San Juan" river (to the extent allowed by the winding of the watercourse) until it reaches the Atlantic Coast. Further, the Government of Nicaragua cedes to that of Costa Rica the full use and dominion of the waters of the "Sarapiqui" and an area of land of two square leagues at the port of Sarapiqui, if it is comprised in the demarcated line; also granting, either in the Treaty of Limits, or in the Treaty of Friendship and Trade, free navigation in the river and port of "San Juan" for the traffic of imports and exports by the citizens of Costa Rica. However, those who reside in said port shall be subject to the regulations that are established therein with respect to the citizens of Nicaragua. The Government of Nicaragua requests from the

Government of Costa Rica as compensation for the aforesaid concessions to assume the payment of the amount that corresponds to it in the federal debt and also to pay to Nicaragua the sum of two hundred thousand pesos, in accordance with the terms agreed.

The Plenipotentiaries of Costa Rica, after several conferences defending the rights of their country, unanimously agreed that the proposal of the Plenipotentiary Minister of Nicaragua imposed very onerous conditions on Costa Rica, which made them fear that if these were not modified, it would not be possible to achieve the settlement of limits that both parties desired; however, as they must request new instructions from the Honorable National Government, they deemed it convenient to suspend the conferences and continue them opportunely and signed. **Joaquín Bernardo Calvo – Manuel J. Carazo – Dionisio Chamorro**

Annex 9

"PROTOCOL OF THE CONFERENCE OF 9 FEBRUARY 1854", IN ESGUEVA, ANTONIO, *THE BORDERS OF NICARAGUA AND COSTA RICA IN THE HISTORICAL DOCUMENTS*, MANAGUA: IHNCA-UCA, 2007, PP. 340-341, DOCUMENT NO. 132E

February 9, 1854

In the City of San Jose, on the ninth day of February of eighteen fifty-four, the Plenipotentiary Ministers of Costa Rica and Nicaragua met to continue the conferences that were left pending on the past seventh. The Plenipotentiary Ministers of Costa Rica stated: That having examined the last proposal of the Plenipotentiary of Nicaragua with the serenity and maturity that its importance demands, they consider themselves in the need to state: that although they had desired to put a satisfactory end to the question of territorial limits between both countries in testimony of the sympathies that animate this Republic in favor of the that of Nicaragua, they feel that it does not conform at all with the demands comprised in the aforesaid proposition as it extends undeniable documents that fully justify the right that Costa Rica possesses in the Province of Guanacaste, and the incontrovertible reason with which it defends the western limits of its territory, it is not within the will of the Government to consent to a notable dismembering of what in fact and by right belongs to the Republic, nor does it believe it has the duty to agree to any compensation for the part of the territory that it would desire to give up, as this would be a double national sacrifice, simultaneously ceding the rights of Costa Rica and encumbering the public treasury, without any plausible reason, with a huge debt that would not be unburdened for many years, and that could precipitate it into an abyss; notwithstanding this, Costa Rica would agree to recognize as the western limit of its territory the mouth of the "Colorado" river on the Atlantic, continuing along the bank of said river up to that of the "San Juan", continuing along this up to the shore of the Lake and then continuing in a straight line from said shore to the "Flor" river up to its mouth on the Pacific; it being well understood that the waters of the river and port of "San Juan" and the waters of the Lake would be free at all times for the traffic of imports and exports of Costa Rica; in which case it would declare the debt owed by the Treasury of Nicaragua to the Treasury of Costa Rica as paid, thereby settling and concluding this transaction; but if the Plenipotentiary of Nicaragua regretfully refuses to accede to this definitive and final proposition on the part of Costa Rica, the question could be subject to arbitration under the terms proposed in the minutes of 16 January, or the resolution would be postponed for another time, notwithstanding the signing of a treaty of Peace, Friendship and Trade that expressly stipulates that at no time shall said question of limits be settled and concluded through the use of violence or force, as that would be extremely harmful and ruinous for both countries, and is also loathed by the civilization of this century. And the Plenipotentiary of Nicaragua stated: that he is highly sensitive to the reply that the Plenipotentiaries of Costa Rica give to his last proposition made in the foregoing minutes, because it dispels all hope of achieving an amicable and fraternal settlement that his Government and he desire; that notwithstanding this, he does not end his mission for the time being, but rather until the next conference, in which he will give a reasoned reply to the proposition of the Ministers of Costa Rica; and that he hopes that the days that elapse between this discussion and the next will be used by both parties to ponder and weigh, in the most detailed manner, the advantages that the aforesaid agreement would bring to both parties, and the fatal consequences that would result if the opportune occasion now presented by the Government of Nicaragua is not used to reach a satisfactory and mutually advantageous agreement. — **Joaquín Bernardo Calvo — Manuel J. Carazo — Dionisio Chamorro.**

Annex 10

"MEMORANDUM FROM COSTA RICA, DATED 13 FEBRUARY 1854, MENTIONED IN THE PROTOCOL OF THE CONFERENCE OF 17 FEBRUARY", IN ESGUEVA, ANTONIO, *THE BORDERS OF NICARAGUA AND COSTA RICA IN THE HISTORICAL DOCUMENTS*, MANAGUA: IHNCA-UCA, 2007, P. 344

Document No. 134

Memorandum from Costa Rica, dated 13 February 1854, mentioned in the protocol of the conference of 17 February.

"The Plenipotentiaries from Costa Rica propose as the last term on the matter of territorial limits with the Republic of Nicaragua: that this [state] recognize as the limits to the territory of Costa Rica the Point of Descartes on the Pacific, and continuing on the meridian beach of said point, follow a straight line as it separates from the ocean towards the delta of the "Refugio" river in the Lake of Nicaragua, and taking the bank from this to the "San Juan" river: from there the southern margin of the said river up to the "Colorado" and taking the bank from this one up to its mouth in the Atlantic. The waters of the river and Port of San Juan would be free for the traffic of imports and exports from Costa Rica, without the trade at any time being burdened with any kind of taxes. *Costa Rica renounced for always the free navigation of the Great Lake; and by way of free transfer offers to assist the Treasury of Nicaragua with one hundred thousand strong pesos payable in ten parts in ten years, including in this quantity those that that Treasury owes to that of Costa Rica, previous liquidation. Costa Rica renounces all right to Castillo with a one league radius over the territory in which it is.*"

RAGHN, Vol XI, No. 2, January-March 1952, 145-146.

Annex 11

MESSAGE OF THE PRESIDENT OF THE REPUBLIC [OF COSTA RICA] TO THE CONGRESS OF 6 SEPTEMBER 1857

SOURCE: *GACETA OF EL SALVADOR*, COJUTEPEQUE,
7 OCTOBER 1857

(-1-)

GACETA OF EL SALVADOR

YEAR: 1857

COJUTEPEQUE; WEDNESDAY, OCTOBER 7

(...)

[COPIES]

(...)

Message of the President of the Republic to the Congress of 1857. Honorable Representatives.

When, on August 3 of last year, I offered for your consideration the chart that represented the Republic, I provided for you in this very place a summary of the events that had occurred up to that time, my heart quivering and moved by the uncertainty of the future that awaited the Republic. However, never did I doubt the patriotism and enthusiastic support of the National Representation, nor did I question the effective cooperation of the heroic Costa Ricans in bringing a glorious end to the bloody struggle initiated in defense of our most cherished rights.

(-2-)

Great and infinite were the difficulties of all types that faced the Government, but all having been surpassed by a firm and decided will, I raised the voice of alarm yet again and was answered unanimously by all peoples. I ordered a column of brave men to march to the world of a general of known experience, to fight the enemy on the field of honor, as demonstrated gallantly in the area of Rivas. Convinced that our efforts and those of our allies would be made in vain unless we attacked the filibusterer at the source of his great resources and troops —that is, unless we stripped him of the forts and steamers with which he dominated the San Juan River and Lake Nicaragua, by means of which his men, arms and supplies would arrive every fifteen days on a scale much greater than ours and even greater than that of all Central America— I ordered the risky maneuver of surprising the enemy at these points.

The probabilities for the success of this daring expedition were more than doubtful due to the magnitude of the obstacles that our courageous army was forced to fight. In spite of all this, and in spite of the most foul weather, they took to the fight with bravery, through thick forests, over broad mountains and across scandalous rivers.

God protected our objectives and our efforts, and within very few days the national flag fluttered over the forts on the river, at Punta de Castilla and on the beautiful Lake Nicaragua.

This mortal blow to the bandit and his followers was the precursor to new triumphs: the allied armies recovered their energy; our vanguard column, which had evaded the force of the enemies of our independence, returned to active maneuvers; and working all in concert under the orders of the general-in-chief appointed by the governments, we ended the campaign on May 1 of this year, 1857, a memorable day for Central America, a day of glory for the Latin race that has known how to defend its religion and its homeland and to teach a fine lesson to the savage horde that intended to subject us to the most oppressive slavery.

Victory cost us many precious victims, but these victims have given life to the Central American continent and perhaps to all of Spanish America. The blood of our brave men on the battlefields will forever remain the fruitful seed of immense good for the homeland!

I will not detail the difficulties with which, as mentioned above, the Government struggled in the conflict in which the Republic became embroiled by undertaking again this war that has concluded. With the objective met, those who in timidity or malice used all types of invectives to weaken the providence of salvation will be disillusioned to see that the people of Costa Rica know their true rights and set their sights on those who mean them harm in any way. The Government feels the satisfaction of having passed over all of these inconveniences, advancing its arduous undertaking with valor, strength and perseverance.

However, despite the Republic's efforts to cast the bandit and his infamous crowd from Central American soil, the fight is not over. No, a second and more terrible clash threatens us, and we must remain for a long time under alarm so as never to be caught unaware. With this intent, the Government has ordered the army to form once again, with eight thousand men whose military instruction is not to be neglected for even an instant. In addition to the military supplies and elements that continue to be obtained, orders have been placed for everything necessary to create the most complete military materiel possible given our resources and circumstances. With disciplined and well-equipped soldiers, the army may succumb, but it will succumb with glory and honor after having made the enemy pay dearly for its victory.

I must express here, with the most sincere warmth of my understanding, the relevant merits of the generals who, with such selflessness —sacrificing their own welfare, interests and that which is most dear in life— surrounded the Government to save the country from the ruin that threatened it. Yes, they are the ones who, from the start of the campaign, have contributed powerfully to the best and most felicitous success of the operations on the San Juan, on the lake and in the territory of Nicaragua. They are the ones who have suffered a thousand privations and the risks of war and of plague, and they are also the ones who went first into combat, assuming the honorable and delicate assignment of the governments to direct the movements of the allied army until the conclusion of the war, and being the first to initiate the war this year and the last to return to their homes, after eighteen months of absence in active service to the Nation.

Also weighing in my thoughts are the commanders, officers and soldiers of the army, who bravely and heroically complied with the duty entrusted to them. I recommend to you, as is just, those who have served the Republic. And I call your high attention toward the unfortunate mutilated and disabled, toward the widows and children of those who gave their lives in defense of the homeland.

It costs the Nation great quantities of money to maintain and transport the filibusterers who surrendered in Rivas and those who deserted in flocks from the ranks of their audacious leader. But I believe that such spending is not of waste, if we consider that it demonstrates our humanitarian conduct on all occasions, proving that we are not the barbarians we were depicted to be. On the contrary, from their incursion into the neighboring Republic, our enemies have shown the entire world that savagery is inherent to them, and that true civilization is unknown to them. These men have respected nothing in satisfying their imprudent ambitions. They have bloodied the scaffolds with innocent Central American victims, brought valuable riches to ruin in despoiled Nicaragua, burned beautiful cities, sacked temples and committed a thousand other excesses against morality. In sum, they have tread upon the rights of individuals and violated all laws human and divine. Who, then, will justly be called the barbarians?

The facts will respond. History will respond.

The Government has had the awareness, after eighteen months of campaign in which immense sums have been invested, to tax the inhabitants of the Republic as little as possible, for national incomes have been of powerful assistance for the resulting expenditures.

Satisfactory and very plausible it is that, in spite of the battering of the war and the plague that affected the Nation, it has not retreated in its march toward progress. In the midst of the focus on the campaign, coffee —this precious fruit that provides the larger part of the country's wealth— was harvested and taken to the port of embarkation, even though this year's harvest was among the largest seen since 1848.

There has been no lack of fruits to feed the people, and the crops sowed for the upcoming harvest are so abundant that they exceed those planted in normal times.

The general and local roads of the towns have been and are being repaired to the extent possible, ensuring the comfort of inhabitants and ease of transport for commercial transactions.

One of the most important objectives of which the Government has not lost sight is the teaching of our youth. It is true that we have not reached the level of perfection to be desired. However, the adoption of new methods for schools and the continuous dedication of the authorities, with support from parents, will in the future provide new and seasoned results from the teaching in all of the sciences.

Finally, the Republic is not moving backward; it continues on the path to prosperity, conserving within it the peace and domestic order that it contentedly enjoys. Without doubt, its name will be raised among those of other nations, and it will achieve great results in its intellectual capacities and in its physical and moral character.

(-3-)

Fortunately, and in a manner complementary to the tranquility in which the country rests, the harmony and friendly relations with foreign countries will remain inalterable. The Republic is held in esteem by the maritime powers and secondary powers of Europe.

The gentleman D José de Zambrano y Viana, the chargé d'affaires of Spain, was recently here. After mutual and respectful demonstrations of friendship, he traveled to Guatemala, where he is currently found.

The Government of the United States recently afforded us proof of its friendship and of its hope for the good of Costa Rica. Zealous of our national honor and dignity, our chargé d'affaires in Washington remains vigilant in order to dispel the impressions that any sinister report by our adversaries may produce within said cabinet. It is very satisfactory that, to date, even the slightest disagreement has not occurred between the two countries, or the smallest difference of opinion between their governments.

From the Hispano-American Republics of the South, we have received unequivocal demonstrations of confraternity. Those we commissioned to request a loan and to cultivate and reinforce the bonds of friendship were received in Peru and in Chile with the courtesy and consideration that is customary in civilized countries. We have received similar important communications from Brazil, Nueva Granada, Bolivia, Venezuela, Ecuador and Paraguay.

When Mr. Don Pedro Galvez, a representative of Peru, and Mr. D. Francisco Solano Astaburuaga, from Chile, arrived in this Republic, their public nature was recognized and they were treated with the respect and consideration necessary under diplomatic circumstances and as required by the harmony between friendly and brotherly countries linked by several titles.

At the proper time, you will be informed about the pacts celebrated between the Government and these Representatives.

No deed has occurred to alter the harmony, alliance and good comprehension established with the governments of Central America. On the contrary, having renewed the family ties that have united us since distant times in order to fight and cast out a common enemy from the territory of the continent, these governments work in accordance with that of Costa Rica on the important task of consolidating Hispano-American independence, ensuring that the sad and bloody scenarios that we have seen are not repeated within any of the States, whether brought by foreign adventurers who seek to usurp our nationality, or caused by the partisan spirit that has resulted in so much misfortune for the peoples of all lands and during all eras.

A special commissioner close to the Provisional Government of Nicaragua was also received with demonstrations of benevolence. Unfortunately, however, some of the affairs to which he attended did not reach the happy ending to be expected from a sister Republic, a friend and neighbor with which Costa Rica has always sought the best and most open relations due to the mutual interests that bind them and especially the common defense to which they are called. With all of this, the Government does not doubt that when a Constitutional Leader appears in said Republic and its Administration is normalized, affairs will be assessed with due calm, the justice with which Costa Rica claims certain rights that belong to it will be acknowledged, and, in recognition of the convenience not only for Nicaragua but also for all of Central America, a public treaty will be established on the bases assumed here to be founded in said rights.

JUAN RAFAEL MORA
San José; September 6, 1857

Annex 12

NOTE FROM WILLIAM CAREY JONES, SPECIAL AGENT OF THE UNITED STATES TO CENTRAL AMERICA, TO LEWIS CASS, SECRETARY OF STATE OF THE UNITED STATES, 2 NOVEMBER 1857

SOURCE: MANNING, WILLIAM R. (ED.), *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, INTER-AMERICAN AFFAIRS: 1831-1860*, WASHINGTON: CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 1934, DOCUMENT NO. 1406, PP. 621-625 (EXTRACTS)

(-621-)

(…)

1406

William Carey Jones, Special Agent of the United States to Central America, to Lewis Cass, Secretary of State of the United States [1]

[EXTRACT]

VIRGIN BAY, *November 2, 1857.*

SIR: I have arrived here this morning from Managua expecting to have reached here several days sooner prevented from circumstances—absolutely beyond my control, having been left thru several nights by the treachery of the persons appointed to conduct me virtually a prisoner upon the Beach of Lake Nicaragua. As it is possible that the Steamer for Panama may pass San Juan del Sur to day, in anticipation of her time I think it more prudent to send you this brief note by express, in place of a more detailed Statement. If I can possibly reach. San Juan del Sur previous to the arrival of the Steamer, I shall write you more fully. You will understand however

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[1] Special Agents, vol. 20. Received December I

(-622-)

pretty nearly from the correspondence that has taken place between this Government and myself in which copies are herewith sent […] what the

(…)

(-623-)

state of affairs is here. The news of the Blockcade of the head of the San Juan River & the seige of the fort of San Carlos by means of the Steam-

(…)

(-624-)

ers in possession of the Goverment of Costa Rica reached Managua about sixteen days ago. My relations with the Goverment of this Republic were such as to induce the Functionaire of it to make a common request of me to undertake the passage of the Blockcade in my official capacity. From the nature of my instructions and especially of the letter of 30th July [1] in which I was so particullay informed of the views of the department, I considered the objects to be attained and the information that I could therefore forward by the making passage of the San Juan River and observing for myself, I thought that to be the most immediate of my duties. I therefore assented to the solicitation of the Goverment of Nicaragua; and propose still to return from San [Juan] del Sur & if I shall be furnished with a sufficient Boat & crew to go down the River to San Juan del Norte & communicate with the Captain of the Saratoga & report to the department by the first British Steamer, I am further induced to this enterprise thinking that the department has corresponded with me through the Commercial agent there. And as it is a long time since I have received any direct communication from the department and one which I did receive was in duplicate and I may therefore suppose that the original was sent by some other route.[2] . . .

You will perceive by the copies of papers which have been furnished to me by the Goverment of Nicaragua that as early as June last the Goverment of Costa Rica refused to deliver the fortress of "Castilla Viejo" and refused also to confirm a Treaty of limits with Nicaragua which gives to Costa Rica the free passage of the River San Juan for her importations & exportations quite as much as according to my instructions agrees with the views of the department. I have therefore not hesitated to make known to the authorities of this State and by such means as have been in my power to the Goverment of Costa Rica & to the authorities of the other. States of Central America that it was the oppinion of the United States that the Jurisdiction of the entire Transit route ought to be *sole* & not divided and that that Jurdisdiction ought to remain with the State (namely Nigaraguia) to which it had previously belonged: and that Costa Rica was precluded by her p[re]vious declarations from converting the war which was concluded through the intervention of Captain Davis of the Sloop St. Mary by the capitulation at

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[1] Above, this volume, pt. 1, doc. 1081.

[2] The omitted portion states his views on the establishment of a government by constitutional election

(-625-)

Rivas on the first of May – into a War of Conquest; and that the question of boundery ought to be restored to the condition in which it was before that War and at all events the Jurisdicition & non interruption of the transit. I fully explained these views to Ge^{nl} Hosi [José] Callas at Granada on the night of the second October when he was on his immediate return to Costa Rica with the view that through him the Goverment of Costa Rica should be informed of the facts. In former letters I expressed the decided oppion *[sic]* that the sudden return to Gen^{nl} Carias to this State had connexion with my coming to it, I am now quite certain of the fact, and am nearly certain non demonstration will admit of that the two weeks detention which I suffered at Punta Arenas were caused by secret influence and would have continued if such an opportunity as the Steamer Columbus had not offered. Nothing here is intended to reflect on the personal character of Gen^{nl} Cañas.

A second object of the visit of that General and Diplomat has developed itself in the present operations of War. He purchased while here large supplies of Provisions & secretly provisioned Castilla [Castillo] Viejo as a *point d'appui* for the war then contemplated for the possession of the Transit. The old war was for the same object. The department may be assured that Costa Rica intends by all means in its power to control the River San Juan and not permit the opening of the Transit except by a monoppoly which will be in a large degree personal; And that no "good Officers [*sic*] or" friendly intention will operate against the cupidity and revenfull animosity to which the Chifis [*sic*] of that State are stimulated.

If it should so happen that by this conveyance I shall not be able to communicate with my Family I request that Mr. Appleton will make known to them that I am here and well & the intention that I have of proceeding directly to San Juan del Norte: - in short, the whole contents of this letter.
I have [etc.].

(...)

Annex 13

NOTE FROM WILLIAM CAREY JONES, SPECIAL AGENT OF THE UNITED STATES TO CENTRAL AMERICA, TO LEWIS CASS, SECRETARY OF STATE OF THE UNITED STATES, 30 JANUARY 1858

SOURCE: MANNING, WILLIAM R. (ED.), *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, INTER-AMERICAN AFFAIRS: 1831-1860*, WASHINGTON: CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 1934, DOCUMENT NO. 1420, PP. 647-648 (EXTRACTS)

(...)

(-647-)

1420

William Carey Jones, Special Agent of the United States to Central America, to Lewis Cass, Secretary of State of the United States[1]

[EXTRACTS]

REALEJO, NICARAGUA, *January 30, 1858.*

SIR: When I had the honor to address you from this place on the 1st inst.[2], I had come hither with the intention to embark on the steamer then expected, bound for Panama. Delays which I could not anticipate, but, as they came, could not prevent, kept me too late an hour to embark, & it was by means of a special courier that I was enabled to communicate with you. I returned, therefore, to Leon. The Minister of Foreign Relations (Don Gregorio Juarez) was there. He informed me that he and another had been appointed special commissioners to meet the commissioners of Costa Rica (Messrs. Callas and Cuadra) at Managua, to determine if possible, the disputed points between the two States. I thought the occasion opportune to a main object of my mission—observation—and went also to Managua. In the meantime, the Commissioners of Costa Rica had retired in a sort of disgust; and, as far as the proposed negotiation was concerned, the journey both of the Costa Rican Commission and myself, was fruitless. The agreement made at Rivas, in December, between the President-General Martinez and the Commissioners from Costa Rica, and which the former gentleman announced to me (in a letter communicated to the Department with my last) as a "definitive arrangement," is understood to have been concurred in by the govt of Costa Rica, but has been absolutely rejected by the "Constituent Assembly" of this State, now in session. It was on the passage of a decree to that effect that the Comrs of Costa Rica departed, without waiting even the arrival of the persons appointed to meet them for new negotiations. Nicaragua is in a better situation than before the treaty, though not perhaps in consequence of it. She holds again the "Castillo Viejo; " but not by delivery from Costa Rica. It was taken from Costa Rica by the party of "adventurers" under Anderson; and on their abandonment of it (on hearing of the capture of their leader and confederates at San Juan del Norte)

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[1] Special Agents, vol. 20. Receipt date is not indicated.

[2] Above, this part, doc. 1415.

[3] Apparently that of January 1, 1858, above, this part, doc. 1415. The letter to him from the President is not included in this publication. See his reply to it, of December Jo, 1857, above, this part, doc. 1411, and note 2, p. 635.

(-648-)

General Jerez, then at San Carlos, with a considerable force, had only to enter. The recovery of this important point, and consequent control of the river, having already fallen to Nicaragua, and a main object of the agreement at Rivas thus accomplished, no doubt influenced the Assembly in rejecting the treaty as a whole. They have since, however, modified their decree, at the instance I believe of Minister Juarez, and propose to renew negotiations at San Jose (C. R.) whither it is proposed soon to send a person to treat. I give it as my opinion that the questions between these States will not and cannot be settled by a treaty voluntarily & mutually made. There is not that disposition in the sentiments of the States toward each other; & if there were I do not perceive any basis for a compromise, unless Costa Rica should consent to abandon the object of her ambition & cupidity for many years, & for which she lately decimated her population in an otherwise fruitless war. Outside pressure (that is, apprehension of invasion from abroad) may operate to prevent on her part any active attempt at this time to regain the control of the river; but she will not voluntarily abandon her pretentions to a share in the line of transit. The river and lake are therefore liable to be the scene of a predatory warfare at any moment that the two States are sufficiently relieved from their present apprehensions of mutual danger.

(...)

Annex 14

LETTER FROM EDUARDO MONTEALEGRE R., MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, TO LORENZO GUERRERO, DIRECTOR OF THE NICARAGUAN TOURISM INSTITUTE, 1 SEPTEMBER 1999 AND EMAIL FROM DR. ALFREDO FERRETTI LUGO, GENERAL SECRETARY OF THE NICARAGUAN TOURISM INSTITUTE, TO CAÑO BLANCO MARINA, 13 SEPTEMBER 1999

The Ministry of Foreign Affairs

1 September 1999
MRE/DM/3098/09/99

Architect
Lorenzo Guerrero
Director
Nicaraguan Tourism Institute
Hand delivered

Dear Mr. Director:

I have the pleasure of addressing you on the occasion of referring to the tourist information published by the Costa Rican company Caño Blanco Marina, in whose brochures appears a printed map that shows part of the territory of Nicaragua and part of the territory of Costa Rica. A great concern for this Ministry is the way in which the border between both countries is depicted since it shows that the same is formed, throughout its extension, by the San Juan River and part of Lake Nicaragua. Further, it identifies islands situated in Lake Nicaragua as part of Costa Rica's territory.

Since this is not an official publication of the Government of Costa Rica, it is not possible to send a note of protest. However, I believe that the Institution under your charge could contact the company Caño Blanco Marina and request that it immediately withdraw the same.

I take this opportunity to renew the assurances of my highest and most distinguished consideration.

(Signed)
Eduardo Montealegre R.

[Seal:] MINISTER OF FOREIGN AFFAIRS
Managua

REPUBLIC OF NICARAGUA
CENTRAL AMERICA

Nicaraguan Tourism Institute
Directorate of Legal Affairs
/s/ Illegible
ne: 3:45
/s/ Illegible

Nicaraguan Tourism Institute
ICE OF THE PRESIDENT
e: Illegible Time: Illegible
Illegible
Received by:

ICS:l/p

(...)

Nicaraguan Tourism Institute

From: Nicaraguan Tourism Institute <intur@intur.gob.ni>
To: tucanti@sol.racsa.co.cr
Re: Tourist information contained in Costa Rica Tortuguero National Park brochures
Date: Tuesday, 21 September 1999, 12:00 PM

Managua, 13 September 1999

Messrs.
CAÑO BLANCO MARINA

The Nicaraguan Tourism Institute (INTUR) finds totally unacceptable the tourist information contained in the COSTA RICA TORTUGUERO NATIONAL PARK brochures, which contain a printed map that shows part of the territory of Nicaragua and part of the territory of Costa Rica, wherein the border between Costa Rica and Nicaragua, throughout its extension, is depicted as formed by the San Juan River and part of Lake Nicaragua, and the islands situated thereon are also identified as part of Costa Rica's territory.

We demand that the brochure of reference be withdrawn immediately from circulation and we remind you that in the future you should obtain more information in this regard, as it is well known the San Juan River is the exclusive property of Nicaragua. Publications of this nature do not contribute at all to the coordination required by a Central American tourism project in favor of the development of our country.

Having no other matters of reference, I sign.

Sincerely,

Dr. Alfredo Ferreti Lugo
General Secretary
INTUR

Cc: Ausberto Narváez Arguello – Acting President
Eduardo Montealegre – Minister of Foreign Affairs

Annex 15

"COSTA RICANS DAMAGE FLORA IN THE SAN JUAN RIVER", *LA PRENSA* (MANAGUA), 13 JUNE 1991

LA PRENSA
NATIONAL **Thursday, 13 June 1991**

Costa Ricans damage flora in the San Juan River

By ZOILA DEL SOCORRO
Special report for LA PRENSA

SARAPIQUI, SAN JUAN RIVER. Costa Rican nationals are destroying the flora and fauna of the San Juan River, recently decreed a national reserve, according to reports by the inhabitants of the town of Sarapiqui, located at a short distance between the San Juan River and Costa Rica.

The people of Sarapiqui report that Costa Ricans dedicated to hunting every Saturday in Nicaraguan territory simply cross the river and bring hunting dogs with them to trap spotted pacas, deer, sahinos, pavones, "white faced" monkeys, macaws, parrots, gautuzas and other species in danger of extinction.

According to statements by some persons in Sarapiqui, whose names we omit for "security reasons", Costa Ricans who engage in hunting and indiscriminate deforestation in the San Juan River include the Retana family, Eduardo Arriola Reyes and others.

These families cross over to Nicaraguan territory from every Friday and spend the day selecting hardwood trees, such as cedar, mahogany, West Indies cedar and others, and during the night they cut down the trees with electric-powered saws. Later, on Monday, they load what they have stolen on boats to be sold in the Costa Rican market.

The people of Sarapiqui assure that these violators offer spotted pacas in the Costa Rican market for four thousand and five thousand colones, depending on their size, and every week they sell between one hundred and one hundred and fifty pounds of deer meat and other animals hunted in Nicaragua.

Likewise, macaws are sold for four thousand colones, which is a species in danger of extinction. Parrots are sold for five hundred and even one thousand colones, depending on the species.

At the place known as Sarapiqui, there are sectors, such as La Danta (one hour from the El Castillo de La Inmaculada) and San Francisco, which are

characterized by an abundance of cichlid, which are fished in large quantities and sold in the Costa Rican market.

The complainants pointed out that Commander Jaime Mairena, responsible for the military post in El Castillo, is already aware of this fact, as well as the authorities of San Carlos, but they have done nothing to stop these indiscriminate thefts and deforestation.

The inhabitants of Sarapiquí also state there are pristine forests in that zone with an abundant natural wealth that provide conditions for smuggling weapons and ammunition.

Insofar as the theft of animals and deforestation by Costa Ricans, it is not a recent but rather a historical fact. The question that the complainants keep asking themselves is until when will these people be permitted to plunder and violate our territorial sovereignty and other unruliness?

Annex 16

"TOURIST AND GUIDE KIDNAPPED", *LA NACIÓN* (SAN JOSÉ), 3 JANUARY 1996

La Nación 01.03.96

Intense police operation in north zone

Tourist and Guide Kidnapped

• *Armed group demands $1 million and release of the "Command of Death"*

Santa Rita de Boca Tapada, San Carlos. Two women, both European, remain kidnapped since the night before last by an armed group sought by Costa Rican and Nicaraguan authorities along the north border zone.

The victims were identified as 50-year old Swiss tour guide Regula Susana Siegfried, who has been a resident in Costa Rica for 25 years and works for the company VIATUR S.A., and 24-year old German tourist Nicola Fleuchaus.

Both formed part of an expedition of 12 German tourists who were the object of a surprise assault last Monday, at 8pm, at the hotel the Laguna Lagarto Lodge in Santa Rita, located seven kilometers north of Boca Tapada de San Carlos. The foreigners had arrived in the country on December 28 and were planning to stay two or three weeks.

Eight or ten individuals wearing fatigue uniforms and ski masks and carrying high-caliber weapons, such as AK-47s, M-16s and grenades, participated in the assault, erpetrated minutes after dinner.

Witnesses revealed that most of the subjects spoke with a Nicaraguan accent, although they said they were able to distinguish several Costa Ricans. Police sources have stated that at least one woman was involved.

After gagging the guests and employees, the kidnappers fled at midnight in a rural vehicle, taking the two women with them and an unspecified amount of food, jewels and other personal belongings.

The group, which calls itself the "Viviana Gallardo Command", left behind a list of demands, including, among others, a ransom of $1 million (¢195 million at the official exchange rate) and the release of the group members who kidnapped the Supreme Court magistrates in 1993.

Yesterday, the Government approached the incident with great caution and appointed a special commission to coordinate police actions in the north zone and centralize all communications with the media.

The aforementioned commission includes Manuel Alvarado, Director of the Judicial Investigation Office (OIJ) and Information Minister Alejandro Soto, Public Security Minister Juan Diego Castro and Tourism Minister Carlos Roesch.

Minister Soto, acting as the spokesperson, insisted at the two press conferences held at 10:52 a.m. and 4:05 p.m. that national authorities are willing to engage in dialogue with the kidnappers.

When this edition went to press, allegedly no contacts had been made.

Discretion

The Costa Rican Government and Police are handling this case with absolute discretion.

News of the kidnapping, which was broadly disseminated yesterday by international news agencies, generated strong fear in official circles given the impact it could have on the influx of tourism.

German tourists represent a strong source of foreign currency for Costa Rica. According to Costa Rican Tourism Institute (ICT) figures, a total of 761,000 foreigners visited our territory in 1995, of which 40,000 were Germans.

This incident is just another link in a long chain of attacks against tourists.

One of the most recent cases occurred last December 14 when 15 Germans were assaulted at the Mirador de Orosi in Paraiso de Cartago by masked individuals who stole ¢10 million in personal belongings.

Mario Gutierrez, manager of VIATUR, S.A., stated that even though they are receiving a lot of support from the Government, the tourism sector has been seriously affected by the criminal attacks against foreign visitors.

He indicated that other customers have been victims of theft and attacks both in the capital city and in the interior of the country.

Alejandro Soto did not hesitate yesterday to qualify the incident as "an isolated event" and assured that the Government is willing to dialogue with the kidnappers in an effort to safeguard the physical safety of both women.

For this purpose, a negotiating group was sent yesterday to Ciudad Quesada. Manuel Alvarado, OIJ Director, informed that this interdisciplinary group is made up of 15 persons, including 2 psychologists.

The Minister of Tourism also talked with the father of Nicola Fleutchaus and the relatives of Regula Susana Sigfried to inform them, first hand, about the operation being carried out.

Foreign Secretary Fernando Naranjo also contacted the Embassies of Germany and Switzerland in the country.

On the other hand, police authorities have sought the support of their Nicaraguan colleagues given the possibility that the group of kidnappers could have fled last Monday night to that neighboring country.

That theory gained strength at 10am yesterday, after the 4-Runner vehicle, license plate 240982, that was used by the commando to leave the Laguna Lagarto Lodge hotel was found by the Border Police on the north bank of the San Juan River

At 3:00 p.m., Fernando Sánchez, OIJ director in San Carlos, met at the mouth of the San Carlos River with Edin Lago, regional chief of the Nicaraguan Army, to exchange information on the kidnapping.

Annex 17

"BORDER ROW WITH NICARAGUANS", *LA NACIÓN* (SAN JOSÉ), 16 JULY 1998

NACION.com
San José, Costa Rica
Thursday, 16 July 1998

Army prevents police navigation

Border row with Nicaraguans

• ***Militaries complain police are navigating with arms***

Berlioth Herrera and Carlos Hernández
Writer and reporter from La Nacion

A new border row between Costa Rica and Nicaragua emerged yesterday when the Nicaraguan Army issued an order prohibiting navigation on the San Juan River by armed Costa Rican police in the north zone.

The order bothered the Government of Costa Rica, which claimed since yesterday afternoon the right of free navigation over this river course, which is the only route it has to supply food and change the guard at the four border posts located between La Cureña de Sarapiquí and Barra del Colorado.

The order was issued by Colonel Orlando Talavera, Chief of the Southern Military Detachment (next to the border with Costa Rica), with support from senior authorities of the Nicaraguan Army, as stated last night by Milton Sandoval, the Press Secretary.

"This measure was taken because our troops had detected the presence of armed Costa Rican civil guards navigating on the San Juan River," explained the military officer.

However, the reply of the Costa Rican Atlantic Command, headquartered in Sarapiquí, was forthwith.

The logbook kept at the Costa Rican Delta 14 police post indicates that after the Nicaraguan measure was announced, an order was received from the Sarapiquí command, which stated: "Neither will the Nicaraguan police be permitted to set foot on Costa Rican soil."

Necessary step

The Minister of Security, Juan Rafael Lizano, told La Nación that yesterday afternoon he sent a note to the Minister of Government of Nicaragua, José Antonio Alvarado, explaining why the Costa Rican Public Forces need to navigate over the San Juan River.

"There are Costa Rican police posts that are impossible to reach except through the San Juan, and we need to do that to change the guard and supply food to our men."

He was disturbed by Nicaragua's questioning whether armed police could navigate over the river course. He emphasized that the police needs to carry weapons because it is an inhospitable zone and because of the amount of food they transport.

"The Cañas-Jerez Treaty of Limits (signed on April 15, 1858) grants us the right to navigate the San Juan River and points out that the only prohibition is for vessels of war. In this case, it is not about armed vessels, but weapons that are used by the police for their own security," he stated.

He also pointed out that he is unaware of the reasons that are pushing the Government of Nicaragua to take this measure. When he was asked about unofficial versions that are circulating which indicate that it was to take reprisal due to the growing number of illegal Nicaraguans that are being captured, he replied: "We are doing our work. Yes, we have reinforced our control measures and it's true that the number of deportees has increased."

However, he indicated that he did not have the exact number of persons who are deported every day, although information provided by the Delta 14 control post at Sarapiquí shows that 54 undocumented persons were detained between 17 June and 14 July, and 14 more persons were detained last Tuesday.

When he was consulted yesterday at noon, President Miguel Angel Rodríguez stated he was unaware of the situation, but that Costa Ricans have the right to navigate over the San Juan River.

Only with permission

Nicaraguan Captain Milton Sandoval highlighted that the Army clearly told the Costa Rican police that from now on they had to request permission from the Ministry of Defense in order to carry out their trips.

He stated that high-level coordination will be necessary to lift this measure.

Yesterday Chancellor Roberto Rojas said that he will take advantage of his participation at the Meeting of Foreign Ministers, which will take place before the Presidential Summit in El Salvador, to dialogue with his Nicaraguan counterpart Emilio Alvarez Montalván about this matter.

On his part, Costa Rica's Ambassador in Managua, Edgar Ugalde, stated that he did not have any additional knowledge about this matter. "Even today (yesterday for our readers) I met for more than one hour with Foreign Minister Alvarez and he didn't even comment anything to me about this matter. I suppose he doesn't know either."

Annex 18

"ALEMÁN REJECTS ARBITRATION: COSTA RICA ACCEPTS NEW MEETING WITH NICARAGUA",
LA PRENSA (MANAGUA), 25 JULY 1998
(A) ENGLISH TRANSLATION
(B) SPANISH ORIGINAL

Nationals

Saturday, 25 July 1998 **LA PRENSA**

Alemán rejects arbitration
Costa Rica accepts new meeting with Nicaragua

HUMBERTO MEZA AND ALBERTO L. ALEMÁN

Although Nicaragua and Costa Rica have scheduled a new meeting next week at a political level, the border impasse could deepen after President Arnoldo Alemán rejected the proposed international arbitration that was considered as a possibility by Costa Rican Foreign Minister Roberto Rojas.

After Costa Rican officials accepted the new meeting, Foreign Minister Rojas stated that Nicaragua's position was a unilateral decision taken as a reprisal against Costa Rica for the deportation of illegal Nicaraguan immigrants.

"We don't understand what's happening because what was said does not match what is done. The President of Nicaragua assured us that they did not see any problems with respect to navigation over the river, as well as with respect to their demands for Nicaraguan custodies, but when we got to the core negotiation, Nicaragua's position was different", underscored Rojas.

In reply, Army General Major Javier Carrión, the primary leader of the technical negotiations that failed in Costa Rica, assured that the public forces' claims are due to their inexperience in that position.

"The position we maintain is to permit armed navigation, but with Nicaraguan supervision. Since the past we made transfers that way. Now the new public forces want to overlook this formal procedure", indicated the military chief.

"Surveillance by Costa Rica is necessary in that zone because there is a lot of illegal immigration, smuggling and other anomalies, which make it necessary to guard that southern part of the river," stated Foreign Minister Rojas.

ALEMAN: THERE IS NO ROOM FOR ARBITRATION

In the meantime, President Alemán, accompanied by the Central American heads of state, warned yesterday that he rejects any type of international arbitration in the negotiations, after indicating that Nicaragua will not change her position because she has supreme sovereignty over the San Juan River according to the Cañas-Jerez Treaty signed in 1858.

"They already have free commercial navigation. Armed vessels are never commercial. Here there is no room for arbitration," stated the Nicaraguan President, indicating that he would have liked to have Rodriguez in the country in order to solve the conflict "face to face".

The statements of Alemán were accompanied by the President of Honduras, Carlos Roberto Flores, who urged the parties to seek a negotiated solution to the conflict.

"There is no difference or divergence that cannot be settled through dialogue," indicated the President of Honduras.

According to versions published in the Costa Rican newspaper La Nacion, the Costa Rican delegation is also suspicious of the meeting because of the changes in the executive branch that were officiated this week by President Arnoldo Aleman, essentially in the areas of defense and foreign affairs.

"For us it is uncomfortable or at least difficult being that at a time we are having discussions, the persons with whom we are talking are changed. However, that is not a reason to stop talking," underlined Rojas according to a journalist from La Nación.

In reply, President Arnoldo Alemán underestimated such concerns, stating that, in first place, the changes will take effect in September, which in his opinion provides more than enough time to continue the negotiations.

The conflict could further escalate after the Nicaraguan Foreign Ministry informed LA PRENSA that the Government of Nicaragua will replace Nicaragua's Ambassador in Costa Rica, Alvaro Sevilla Siero.

Although the exact date is unknown, LA PRENSA was able to confirm that Sevilla will be replaced by Enrique Paguaga.

Nacionales

25 de julio de 1998

Alemán rechaza arbitraje

HUMBERTO MEZA y ALBERTO L. ALEMÁN

Aunque Nicaragua y Costa Rica han programado para la próxima semana una nueva reunión a nivel político, el impasse fronterizo podría llegar a profundizarse, luego que el presidente Arnoldo Alemán rechazó la propuesta de un arbitraje internacional, considerando como una posibilidad por el canciller tico, Roberto Rojas.

Luego que los funcionarios costarricenses aceptaron el nuevo encuentro, el canciller Rojas consideró la postura de Nicaragua como una decisión unilateral, tomada en represalia a las deportaciones de Costa Rica, contra inmigrantes ilegales nicaragüenses.

"No entendemos lo que está pasando porque lo que se habla no concuerda con lo que se hace. El presidente de Nicaragua nos garantizó que no veían problemas por la navegación sobre el río y además sobre las exigencias de custodios nicaragüenses, pero cuando se llegó a la negociación puntual, la posición de Nicaragua fue diferente" subrayó Rojas.

En respuesta, el Mayor General del Ejército, Javier Carrión – principal dirigente de la negociación técnica que fracasó en Costa Rica – aseguró que los alegatos de las fuerzas públicas se deben a las inexperiencias de su cargo.

"La posición que mantenemos es permitir la navegación armada, pero con un custodia nica; incluso desde el pasado hacíamos los traslados de esa forma. Ahora las nuevas fuerzas públicas quieren hacer caso omiso a ese procedimiento formal", indicó el jefe militar.

"La vigilancia por parte de Costa Rica se debe a que por esa vía se presenta mucha inmigración ilegal, contrabandos y otras anomalías, que hacen necesaria la custodia de la parte sur del río", aseguró el Canciller Rojas.

ALEMÁN: NO HAY ESPACIO PARA ARBITRAJE

En tanto, el presidente Alemán, acompañado de los mandatarios centroamericanos, advirtió ayer que rechaza cualquier tipo de arbitraje internacional en las negociaciones, tras indicar que Nicaragua no cambiará de

posición por tener la soberanía suprema sobre el Río San Juan, según el Tratado Cañas-Jerez, firmado en 1858.

"Ellos ya tienen la libre navegación comercial. Las lanchas armadas en ninguno momento son comerciales. El arbitraje aquí no cabe", expresó el mandatario nicaragüense al indicar que le hubiese gustado la presencia de Rodríguez en el país, a fin de resolver "cara a cara" el conflicto.

Las declaraciones de Alemán fueron acompañadas por el Presidente de Honduras Carlos Roberto Flores, quien urgió una salida negociada al conflicto.

"No hay ninguna diferencia ni ninguna divergencia que no pueda ser solucionada por medio de los diálogos que se puedan sostener", indicó el mandatario hondureño.

Según versiones del diario La Nación de Costa Rica, la delegación nica mantiene otras suspicacias sobre el encuentro, debido a los cambios que oficializó esta semana el Presidente Arnoldo Alemán en el Ejecutivo, esencialmente en las áreas de Defensa y Relaciones Exteriores.

"Para nosotros es incómodo, o por lo menos difícil de que en un momento que hay discusiones se estén cambiando las personas con quién platicamos. Sin embargo, esa no es razón para no continuar platicando", subrayó Rojas según un periodista de La Nación.

En repuesta, el Presidente Arnoldo Alemán desestimó tales preocupaciones, alegando en primera instancia que los cambios serán efectivos a partir de septiembre, situación que a su juicio les da más tiempo para continuar las negociaciones.

El conflicto podría llegar a subir de tono, luego que la Cancillería nicaragüense confiara a LA PRENSA que el Gobierno nicaragüense removerá al embajador nica en Costa Rica, Álvaro Sevilla Siero.

Aunque se desconoce la fecha del traslado, LA PRENSA logró confirmar que Sevilla será sustituido en su cargo por Enrique Paguaga.

Annex 19

"COUNTRY FIRM IN MEETING WITH NICARAGUANS",
LA NACIÓN (SAN JOSÉ), 29 JULY 1998
(A) ENGLISH TRANSLATION
(B) SPANISH ORIGINAL

NACION.com
San Jose, Costa Rica
Wednesday, 29 July 1998

Meeting tomorrow in Managua

Country firm in meeting with Nicaraguans

• Army warns that it will defend sovereignty

Carlos Villalobos and Mauricio Herrera
Reporters from La Nación

CONFLICT ZONE. William Herrera, a civil guard at post Delta Eight, located in the headwaters of the Colorado River, northern border, stood

While Public Security Minister Juan Rafael Lizano will travel tomorrow to Managua to defend the right of Costa Rica's police to navigate the San Juan River with their weapons, Nicaragua's top military chief, Joaquín Cuadra, warned yesterday that the Armed Forces are obligated to defend their country's sovereignty.

Lizano communicated his position at 3:50 p.m. after accepting the invitation by Defense Minister Jaime Cuadra Somarriba. The meeting will take place at the Ministry of Defense at 9:00 a.m.

Yesterday morning, Cuadra, who is the Chief of the Army, made this warning during an improvised press conference, in which he also stated that his men had the capacity to immediately reinforce the zone of the San Juan River with helicopter-transported troops.

For his part, President Arnoldo Alemán announced that next Monday and Tuesday he will travel through the river as part of his actions to ratify the sovereignty of his nation over the fluvial course.

The dispute between both nations began on July 15 when the Nicaraguan Army instructed its men to prohibit navigation by Costa Rican boats carrying armed police on the San Juan River.

Costa Rican police need to navigate the river to transport food and other supplies to four border police posts on the Costa Rican bank of the San Juan River, which are very difficult to reach by land. To protect themselves, they carry weapons.

No going back

Only one position will be taken by Minister Lizano to the meeting tomorrow. "The negotiating position I will take is to accomplish that our police forces can navigate the river with their service arms. That is the only problem that has existed, and that is my position".

However, he stated, depending on the spirit of negotiation that prevails at the meeting, there could be some signs of flexibility provided they do not affect existing treaties, jurisprudence and tradition. "We cannot go back", stated Lizano. He added that Nicaragua's sovereignty over the San Juan is not under discussion.

The Minister also revealed that the row began because the former Government permitted the presence of military escorts on the Costa Rican boats, a situation he prohibited upon assuming responsibility for the security of the country on 8 May. Further, statistics from the regional immigration office in the north zone indicate that the number of illegal immigrants deported through the north border increased this semester by approximately 50 percent with respect to the same period last year.

Nicaraguan Defense Vice-Minister, José Adán Guerra, informed the press in his country that the only point on the agenda to be discussed by the parties will be the "modus operandi" or Costa Rica's intentions that its vessels navigate with armed police on the river.

"We want to overcome this problem for the benefit of the two countries and Central America", stated Guerra.

Troops ready

Military chief Joaquín Cuadra warned, however, about the possibility of immediately deploying troops to the border with Costa Rica, although he also left open the possibility of a solution resolved by dialogue.

"I am sure that it will not be necessary to resort to extreme measures (…) Now there are civilized ways to settle these disputes through dialogue and diplomacy", he stated.

Nonetheless, he insisted that the "the last echelon" of defense of national sovereignty were the armed forces, which have the obligation to act at any moment.

Deportation of illegal persons increases

During the first seven months of this year alone, Costa Rica has deported more Nicaraguans than in all of 1997, according to Costa Rican police reports and data from the San Juan River Immigration Department in Nicaragua.

From January 2 to July 17 last, Costa Rica deported 15,068 illegal Nicaraguan immigrants detained in the north zone, while there were 8,302 administrative rejections during that same period last year, totaling 10,047 over the 12 months.

These 1998 figures do not take into account 10,700 illegal immigrants who voluntarily presented themselves before the police and immigration agents to be taken out of from the country, bringing the total number to 25,768.

Average monthly rejections stand at 2,152, however, after adding those persons who voluntarily request to be deported, monthly deportations increase to 3,681.

However, according to immigration authorities in San Carlos in Nicaragua, Costa Rica had deported 22,000 illegal immigrants up to June 30 last.

For Costa Rica, a deportation occurs when a decision is reached by the National Immigration Council, but in the cases that have occurred at the border, the term used by the country is "administrative rejection". Nonetheless, Nicaragua considers all devolutions as deportations.

NACION com

San José, Costa Rica
Miércoles 29 de julio, 1998

El País

Reunión mañana en Managua

País firme en cita con nicas

Ejército advierte que defenderá soberania

Carlos Villalobos y Mauricio Herrera
Redactor de La Nación

ZONA DE CONFLICTO. William Herrera, un guardia civil del puesto Delta Ocho, ubicado en la naciente del río Colorado, frontera norte, vigilaba el viernes la zona. Al fondo, territorio nicaragüense

En tanto el ministro de Seguridad Pública, Juan Rafael Lizano, viajará mañana a Managua para defender el derecho de la policía costarricense para navegar con sus armas por el río San Juan, el máximo jefe militar nicaragüense, Joaquín Cuadra, advirtió ayer que las Fuerzas Armadas están obligadas a defender la soberanía de su país.

Lizano comunicó su posición a las 5:30 p.m. al aceptar la invitación que le hizo el ministro de Defensa, Jaime Cuadra Somarraba. La cita se verificará en el Ministerio de Defensa a las 9 a. m.

Ayer por la mañana, Cuadra, quien es el jefe del Ejército, hizo la advertencia en una improvisada rueda de prensa en la que, además, afirmó que sus hombres están en capacidad de reforzar de inmediato la zona del San Juan con tropas transportadas por helicóptero.

Por su parte, el presidente Arnoldo Alemán anunció que, el lunes y martes próximos, recorrerá el río como parte de sus actos destinados a ratificar la soberanía de su nación sobre el cauce fluvial.

El diferendo entre ambas naciones surgió el 15 de julio cuando el Ejército de Nicaragua giró instrucciones para que sus hombres prohibieran la circulación de lanchas de la fuerza Pública tica con policías armados por el San Juan.

Los guardias costarricenses requieren navegar por el río para llevar alimentos y otros suministros a cuatro puestos de vigilancia limítrofes en la margen tica del

San Juan, a los cuales es muy difícil llegar por tierra. Para protegerse, portan armas.

Sin marcha atrás

Una única posición es la que llevará el ministro Lizano mañana a la cita. "La negociación que llevo es lograr que nuestra gente de la Fuerza Pública pueda andar por el río con su arma de reglamento. Ese es el único problema que ha existido, y esa es mi posición."

Sin embargo, dijo que, dependiendo del espíritu de la negociación que reine en el encuentro, podrían generarse señales de flexibilidad siempre que no se afecten los tratados existentes, la jurisprudencia y la tradición. "No podemos echar para atrás", declaró Lizano. Agregó que el tema de la soberanía nicaragüense sobre el San Juan no está en discusión.

El Ministro reveló además que el lío nació porque el Gobierno anterior permitió la presencia de custodios militares en las lanchas ticas, situación que él prohibió al asumir la seguridad del país el 8 de mayo. También, una estadística de la oficina regional de Migración en la zona norte indica que la devolución de inmigrantes ilegales por la frontera norte se incrementó esta semestre en aproximadamente el 50 por ciento con respecto al mismo período del año pasado.

Al frente, el viceministro de Defensa nicaragüense, José Adán Guerra, manifestó a la prensa de su país que el único punto de la agenda entre las partes será "el modus operandi"o las pretensiones de Costa Rica de que sus lanchas transiten con policías armados por el río.

"Lo que queremos es superar este problema para beneficio de los dos países de Centroamérica", expresó Guerra.

Tropas listas

El jefe militar Joaquí Cuadra advirtió, no obstante, sobre la posibilidad de un traslado inmediato de tropas a la frontera con Costa rica, aunque dejó también abierta la probabilidad de una solución dialogada.

"Estoy seguro de que no se va a tener que recurrir a medidas extremas (...) Ahora hay formas civilizadas de arreglar estas contradicciones por la vía del diálogo y la diplomacia", afirmó.

Empero, insistió en que la patria tiene "su último escalón" de defensa de la soberanía en las fuerzas armadas, las cuales están obligadas a actuar en cualquier momento.

Crece devolución de ilegales

Solo en los primeros siete meses de este año Costa Rica ha deportado más nicaragüenses que durante todo 1997, según reportes policiales costarricenses y datos del Departamento de Migración de Río San Juan, en Nicaragua.

Del 2 de enero al 17 de julio pasados Costa Rica devolvió a Nicaragua 15.068 inmigrantes ilegales detenidos en la zona norte, mientras que el año pasado, en ese mismo período, hubo 8.302 rechazos administrativos y un total de 10.047 en los 12 meses.

Estas cifras de 1998 no toman en cuenta a los 10.700 ilegales que se presentaron voluntariamente ante la Fuerza Pública y agentes de Migración para que los sacaran del país, con los cuales la suma asciende a 25.768.

El promedio mensual de rechazados es de 2.152, pero si se le suman los que voluntariamente piden regresar, las devoluciones mensuales llegan a 3.681.

Sin embargo, para las autoridades migratorias en San Carlos de Nicaragua, Costa Rica había deportado a 22.000 indocumentados hasta el 30 de junio anterior.

Para Costa Rica una deportación ocurre cuando media una decisión del Consejo Nacional de Migración, pero en los casos ocurridos en la frontera el término empleado por el país es "rechazo administrativo". Empero, Nicaragua considera todas las devoluciones como deportaciones.

Annex 20

"COSTA RICAN GUARDS POINT GUNS AT NICARAGUANS BOATERS", *LA PRENSA* (MANAGUA), 30 JULY 1998

Thursday, 30 July 1998 NATIONAL LA PRENSA

Costa Rican guards point guns at Nicaraguan boaters

ELIZABETH ROMERO

Over the past several months Costa Rica's civil guard has penetrated the border zone at the San Juan River carrying their firearms and have even pointed their guns at Nicaraguan boaters who transit over those waters.

This version was confirmed by two boat owners who work in those Nicaraguan waters and it was also recorded on video by a Nicaraguan tourist who traveled on 20 June last to that paradisiacal place in the sector of San Juan del Norte. The video tape was given to La Prensa yesterday.

The boaters from the locality told our reporter that on June 17 last, the border police of the southern neighbor were navigating over the San Juan River and threatened them with their firearms.

"They pointed their guns at us and made us go to their post at El Cureño… they asked us for the list of passengers we were transporting and my name", stated one of the affected.

At the time of the incident, the boater was going to La Tigra, however, he clarified that Costa Rican boats "always navigate" over the Nicaraguan waters and travel from La Tigra to Puerto Viejo.

Last July 16, Army Chief, General Joaquín Cuadra, prohibited navigation by the border police of the neighboring country over the boundary area of the San Juan River carrying firearms. That prohibition was backed by President Arnoldo Aleman.

Although members of the General Staff of the Army of Nicaragua traveled to the neighboring country in the south to explain to its authorities that Costa Rica's armed police cannot navigate over that river, they insisted on taking the case before international organizations.

The president of the neighboring country, Miguel Angel Rodriguez, reacted to the Nicaraguan position by refusing to travel to Managua where he would attend the EXPICA exposition.

"Down here at the post in Cureñita, they have a camouflaged brown 200-HP boat… since we navigate the river, they are following us, requesting names, lists", insisted another bcater.

"I made a phone call to the radio and called the Army of Nicaragua to come see the situation here", stated one of the boaters interviewed by our reporter.

The second boater adduces that the reason why Costa Rican police is dedicated to pursuing co-nationals is trafficking of illegal immigrants. "They don't want people to be entering. Every boat they see, they think is going to drop off people", he indicated.

However, Costa Ricans also use the San Juan River more than the Nicaraguans themselves. The waters of the San Juan River are used as a tourist attraction, which does not produce any income for Nicaragua. In the information they provide to tourists, very little is said about the location of the San Juan River. They simply assure that it is in the north border of their country.

According to several tourism businesspeople, such as Mr. Enrique Zamora, the Government of Nicaragua should adopt emergency measures for the development of the San Juan River zone, facilitating telecommunications, the rehabilitation of the San Juan del Norte airport, as well as the enactment of a tourism incentive law to counteract Costa Rica's influence in that area.

Annex 21

"NICARAGUANS DENOUNCE COSTA RICAN HARASSMENT ON NATIONAL TERRITORY", *LA PRENSA* (MANAGUA), 2 AUGUST 1998

LA PRENSA

Managua, Sunday, 2 August 1998

Nicaraguans denounce Costa Rican harassment on national territory

AMALIA MORALES

EL CASTILLO, SAN JUAN RIVER. Ignored by the government. That's the situation faced by the inhabitants of El Castillo, a town located on the south border, on the bank of the San Juan River, who in recent months were harassed and pursued by Costa Rican authorities in Nicaraguan territory.

The agreement signed by the Ministers of Defense of Nicaragua and Costa Rica apparently settles a conflict over protocol. However, it does not take into account the situation of the boatmen and inhabitants of the zone who navigate daily over the waters of the San Juan.

All the activities of El Castillo depend on navigation in the outlet of the Lake of Nicaragua. But in recent months navigation has become a risk for boaters in the zone and a headache for travelers, who sometimes have been pursued and illegally searched by Costa Rican military.

Neighbors of El Castillo say they have been abandoned

One of the boatmen affected by that situation is Geovany Obregón Bustos. He is the boater of the "Titanic III". Obregón Bustos says that the problem started in Costa Rica's boundary bank, from the sector known as La Tiricia up to the mouth of the river.

The boater relates that during a trip he made a month and a half ago from San Juan del Norte to El Castillo, he was attacked by Costa Rican guards.

THEY SHOOT AT THE BOAT

"I was passing by the sector of La Cureña and from their side they signaled me to bring my boat closer, but I didn't stop and I continued. Since I didn't stop, they fired two bullets that fell about twenty yards from the boat", he recounts. In spite of the fear shared with the passengers, Obregón Bustos says he only stopped the boat in front of the first post of the National Army.

He parked the boat at Boca de San Carlos. There he filed a complaint before the national military officers, who immediately communicated with the Costa Rican post. Obregón Bustos recalls that the first reply was lack of knowledge. "The guy who responded to the Nicaraguan Army said he didn't know what was happening and they were going to investigate", affirms the boatmanr. A while later they called back and explained it was a drunken soldier and apologized.

The news became known in the region after fearful passengers reported the incident in a local radio station. The accusation had no echo among the authorities. No measure was taken in that regard.

According to the boatman, it is common to see Costa Rican armed military boats navigating and stopping Nicaraguan boats. Thus, to halt the entry of illegal nationals to their territory is one of the causes for the violation of Nicaragua's rights over the river.

"The truth is that they (the Costa Ricans) are always bothering. Between four and five military carrying 30 and 60 caliber machineguns travel in a 200-HP boat," assures the boatman. They usually carry out patrols and detain national vessels between Boca de San Carlos and La Tigra, according to Obregón.

Another boater is Pedro Reyes, who frequently navigates the river downstream, from El Castillo to the river's mouth in the Atlantic, at San Juan del Norte.

Reyes says that he was followed by Costa Rican military board on a boat. The Costa Rican guards surrounded his boat and forced him to stop in a foreign patio. They ordered him to get out of the boat and he refused to obey the order. To force him, they loaded an M-16 machinegun. The boatman acquiesced in light of the threat and got out. They asked him for the boat documents. They did the same with the passengers. After they confirmed that they were all undocumented, they arrested them. "They went to expel them through Los Chiles", he says.

Reyes believes that the measure is to "catch illegal people." But he does not approve this mechanism at all. The boatman considers that the attitude of the guards constitutes a violation to the rights that Nicaraguans have over the river. "They can only navigate as civilians, but not how they're doing it", he says.

"We are making a living, we're not carrying weapons like them", affirms the boatman, who recognizes that in most of his trips he transports Nicaraguans "without papers" who are going to seek employment and money in Costa Rica.

A similar experience was faced by boatman Pedro Picado. "We were stopped for about 15 minutes with the machinegun", he states. "They have the right to guard their border, but on their side", he says questioning the attitude of the Costa Rican military.

José Trujillo, a Costa Rican border guard, says there are too many illegal Nicaraguans in his country. Trujillo assures that the entry of 2,500 is reported every day. He affirms that traffic along the river bank is exaggerated. "The situation for us becomes very critical because there are hundreds of people." This reality forces them to be strict.

The Costa Rican guard minimizes the stories of the Nicaraguan boaters. He considers that the conflict has originated from gossip. "There are gossiping people who invent things. We respect Nicaraguans very much," repeats Trujillo. "We even exchange greetings with the boaters when they pass".

The population is making claims to the government. They demand a prohibition against the Costa Rican army to navigate with arms over the river. "The Nicaraguan Army lacks firmness. There is a great deal of paternalism with the Costa Ricans, as it is known that the soft part corresponds to Nicaragua and the solid to Costa Rica, but that is not respected", says lawyer José Benito Salazar, a native of El Castillo.

Lieutenant Diego Estrada, chief of the National Army post in El Castillo, says that he does not have sufficient means to carry out frequent patrols and to confirm the versions of the boaters regarding the harassment of the Costa Rican military.

Estrada, who has held that position for a short time, assures that the trips they make to the different towns up to San Juan del Norte are done sporadically when delegations from some institutions leave. But it is not constant.

These are the same conditions under which the Nicaraguan military offers work in other border posts situated in Boca de San Carlos, Sarapiqui of Nicaragua and San Juan del Norte.

According to the inhabitants, the Nicaraguan posts are separated at a considerable distances, which impedes the monitoring of the extensive body of water. On the other hand, the Costa Ricans have set up more posts to guard their territory.

Annex 22

"COSTA RICA RETALIATES", *LA PRENSA* (MANAGUA), 15 AUGUST 1998

LA PRENSA

Managua, Saturday, 15 August 1998

Costa Rica Retaliates

Prohibits Nicaraguan navigation in Barra del Colorado

SAN JOSE (AP). The Government of Costa Rica hardened its measures against Nicaragua yesterday in protest for the annulment of the bi-national agreement on navigation in the San Juan River border.

Security Minister Juan Rafael Lizano announced the prohibition on transit by Nicaraguan Army soldiers through Costa Rica's Colorado River, which is used by the neighbors to the north as an outlet to the Caribbean Sea.

The Colorado River is close to the mouth of the San Juan River and it is used by Nicaraguans as an outlet to the sea when the course of the San Juan River loses depth during the dry season and cannot be navigated.

"In the Colorado River only civil vessels shall navigate, but no Nicaraguan soldiers or armed vessels," said Lizano.

The Minister also ordered the border customs with Nicaragua not to allow the passage of uniformed or armed soldiers when they cross over to Costa Rican territory to make purchases and other tasks.

Lizano was concerned by the increase in the number of soldiers on the San Juan River's Nicaraguan bank and decided to avoid navigation by civil guards who, despite the complication, must now travel by land.

Both countries are in opposition regarding the way in which their fellow citizens should navigate on the San Juan River after the government of President Arnoldo Alemán prohibited navigation by Costa Rica's armed police over those waters.

The frictions increased following the decision of Nicaragua to annul an agreement signed with Costa Rica on July 30 last, which permitted Costa Rica's civil guards to navigate with their service weapons.

Annex 23

"ANOTHER COSTA RICAN MAP 'TAKES THE RIVER'", *EL NUEVO DIARIO* (MANAGUA), 26 AUGUST 1999

Reaction of Minister of Foreign Affairs Montealegre

ANOTHER COSTA RICAN MAP "TAKES THE RIVER"

El Nuevo Diario, August 26, 1999

The government of Nicaragua reacted yesterday to a publication by Costa Rican tour operators, in which a map depicts Nicaragua's San Juan River to be Costa Rican and even makes it appear as if the border of [the southern] country extends to the shores of Lake Nicaragua. Faced with such a publication, [Nicaraguan] Minister of Foreign Affairs Eduardo Montealegre explained that these types of publications, which "seek to create confusion," have been produced since the 1970s and that Nicaragua will send an official note to the Costa Rican authorities to clarify the situation "and, to the extent possible, to clearly establish our rights."

The minister stated that the government will analyze in detail this and other types of publications that sever Nicaraguan territory in favor of Costa Rica. He invited other local institutions, such as the Department of Immigration and the Institute of Tourism, to become involved in the problem.

Montealegre reiterated that the border between both countries is well defined and demarcated. "A more aggressive tour operator probably wants to do something beyond his competence," noted the head of Nicaraguan diplomacy. "That's why we're here."

GOVERNMENT PRESENCE?

As a result of the conflict that the Costa Ricans sought to fabricate last year regarding the provisioning of their troops, attempting to transport armed guards via this route without permission from Nicaraguan military authorities, Montealegre claimed that the Army maintains a presence and that efforts will be initiated to develop the border zone from the area of Cárdenas. He did not provide any further details.

The minister also mentioned the creation of a forest police force that would be deployed in the Indio Maíz Reserve in the country's southern region. He insisted that, to date, there are "interesting alternatives and ideas" to contribute to Nicaraguan development on its border with Costa Rica.

COSTA RICANS CLAIM THEY NEED NO PERMIT

Weeks before, the Nicaraguan government, through the Ministry of Foreign Affairs, expressed to the Costa Ricans that it was willing to collaborate with them with respect to the provisioning of their troops along the border. It has received no response. It seems that, according to the Costa Ricans, no permission is required for them to transit Nicaraguan waters on the San Juan River. "Nevertheless, the offer stands," noted the Minister of Foreign Affairs.

Nicaragua can not and will not accept that the Costa Ricans lay claim to the San Juan River, Minister Montealegre stated emphatically.

(...)

PRESIDENT RODRIGUEZ NOT GOING TO TAIWAN

The minister reported that, "technically," a meeting between President Arnoldo Alemán and his Costa Rican colleague, Miguel Angel Rodríguez, will not be possible during the first week of September in Taiwan, where the Central American leaders were invited by Taiwanese President Lee Ten Hui. The Costa Rican president is not going to Taiwan.

However, Montealegre announced that he will travel to El Salvador today (Thursday) to take part in a meeting of Central American Ministers of Foreign Affairs. There, he will have the opportunity to speak with his Costa Rican counterpart, Roberto Rojas. Montealegre did not say whether they will address the border situation. He did confirm that they will analyze the date of the next bi-national meeting.

Annex 24

"INDIO MAÍZ DECLARED WORLD BIOSPHERE RESERVE", *LA PRENSA* (MANAGUA), 10 JULY 2003

La Prensa
THURSDAY, 10 JULY 2003 / EDITION No. 23145/UPDATED 02:30 am

Antonia Calero Sequeiro
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Indio Maíz declared World Biosphere Reserve

The Indio Maíz Reserve, one of the largest biodiversity reserves in Central America, covering an area of 263,980 hectares, will form part of the World Biosphere Reserve.

Located south of Bluefields, covering part of the Kukra River and El Castillo, in San Juan River, the Indio Maiz Reserve received this designation from the International Coordinating Council of the MAB Programme of the United Nations Organization for Education, Science and Culture (UNESCO) in Paris, according to information provided by EFE news agency.

The title Biosphere Reserve refers to zones located in terrestrial or coastal ecosystems that are recognized by UNESCO's International "Man and the Biosphere" Programme to promote and demonstrate a balanced relationship between mankind and the environment.

A GREAT COMMITMENT

Even though UNESCO in Nicaragua has not received official information regarding this declaration, representative Juan Bautista Arríen stated that it was a great commitment for Nicaraguans, taking into account that UNESCO declared Bosawas as the country's first Biosphere Reserve in 1996.

"It is very interesting that UNESCO once again sets its eyes on Nicaragua; it is significant and a great commitment because it is not just to declare a historical site or biosphere reserve, but a framework based on man and the sphere of life," he stated.

For designating Biosphere Reserves, diverse countries propose zones within their territory that meet specific criteria, such as conservation of landscapes, ecosystems, species and genetic diversity.

The Ministry of the Environment and Natural Resources (MARENA) submitted an application to designate the Indio Maíz or San Juan River Biosphere Reserve.

According to Eduardo Marín, Vice-Minister of MARENA, this designation of the Indio Maiz Reserve will further develop tourism.

"It is a great joy for our country, even though we will have an enormous commitment to preserve it, however, we will have the satisfaction of achieving a greater boom in tourism investment and the world will know that we also have important places in our country", Marin pointed out.

Annex 25

"CROCODILE DEVOURS CHILD IN THE INDIO RIVER", *LA PRENSA* (MANAGUA), 10 APRIL 2007

La Prensa.com.ni
The Newspaper of the Nicaraguans
10.04.07
Managua

Crocodile devours child in the Indio River

Francisco López G.
Correspondent/San Juan River.
departmanetos@laprensa.ni

A 4-year old boy was mortally attacked by a huge crocodile before the helpless eyes of his two brothers who were bathing with him in the Indio River on Sunday afternoon.

Omar Eliu López Rocha is the unfortunate child who died in the jaws of the crocodile when he was bathing in the river.

According to authorities at the Ministry of the Environment and Natural Resources (MARENA), this type of animal is known in the zone as the black alligator.

The tragic event occurred in the community of El Zapotal, municipality of San Juan de Nicaragua, as reported by Captain Rita Matus Granja, spokesperson of the police delegation in the San Juan River.

MARENA has authorized the search and killing of the animal in order to recover the child's body.

The police officer stated that according to information received from that municipality, located 200 kilometers west of San Carlos on the Caribbean coast, the tragedy occurred on Sunday, at approximately six in the afternoon, when the three 11, 7 and 4-year old Lopez Rocha brothers went to bath in the river.

When the children were bathing in the river a 5-meter long crocodile jumped out of the water and attacked the youngest one.

According to statements by the surviving children to the authorities, they were together when the animal jolted out of the water and directed its attack against the youngest one, pulling him away and dragging him to the bottom of the river.

The frightened children ran to tell their family, who in turn informed the Police, Army, Ministry of Health (MINSA) and MARENA authorities, who went to the place to try to do something for the victim but nothing could be done.

The second chief of the Nicaraguan Army's Southern Military Detachment (DMS), Lieutenant Colonel Carlos Navas Salinas, said that soldiers from that institution have been coordinating the search with the police, MARENA and MINSA since Sunday. The search to find the body of the child or his remains continued on Monday, but nothing had been accomplished by Monday afternoon.

In the San Juan River, at the mouth of the river at San Juan de Nicaragua and the Indio River, in front of the town of San Juan de Nicaragua, it is common to see gigantic crocodiles basking in the sun along the sand bars. However, according to local authorities, there have been no reports of crocodile attacks against humans in recent years. This type of predators usually attack and drag their victims to deeper waters in order to devour them without being bothered.

Authorized to kill the animal

These animals belong to a species that is protected under environmental laws, especially in the municipality of San Juan de Nicaragua, which has been declared a reserve. The law prohibits the hunting of animals threatened by extinction as an environmental crime. Article 27 of Law 559 (Special Law on Crimes against the Environment and Natural Resources) provides that any person who hunts animals threatened by extinction shall be punished with two to three years in prison and a maximum fine of 20,000 dollars. The penalty is doubled if the crime occurs in protected areas.

However, sources close to the Nicaraguan Army, affirmed that MARENA has authorized the killing of the animal in order to recover the remains of the devoured child.

The American crocodile (Crocodylus acutus), which is the same species of the reptile, is native to the Americas.

These reptiles live in fresh, brackish and saltwater, and are found south of the Gulf of Mexico, the Greater Antilles, excluding Puerto Rico, and Central and South America, along the Caribbean coast, up to Venezuela.

These reptiles also live in the Pacific coast of Central America and to the north of South America up to Tumbes. In the United States, they can be found in South Florida, as far as Vero Beach on the Atlantic and Tampa in the Gulf.

These crocodiles are much more aggressive than American Alligators. Even the youngest ones are dangerous because they usually do not flee. Adults can reach six meters in length.

Annex 26

"CROCODILE KILLS 13-YEAR OLD BOY WHO WAS BATHING IN THE RIVER", *LA NACIÓN* (SAN JOSÉ), 5 MAY 2007

NACION.COM
Saturday, 5 May 2007
San José, Costa Rica

Crocodile kills 13-year old boy who was bathing in the river

Six-meter animal caught boy by the leg and dragged him into the water
Adults had warned the children about the dangerous presence of these reptiles

Nicolás Aguilar R. y Gabriela Gatjens
naguilar@nacion.com

San Francisco de Tortuguero, Pococí. Yesterday a crocodile approximately six-meter long killed a 13-year old boy who was bathing with several friends at the mouth of the Tortuguero River in the Caribbean Sea.

The victim was Breydi Escorcia Arriola, a first-year student at the high school located in San Francisco de Tortuguero, in Pococí, Limón.

Although neighbors and authorities searched the place, they could not recover the body of the child yesterday.

The reptile attack occurred at 11:45 a.m., about 400 meters from the child's home, who usually bathed in the river in spite of repeated warnings from his parents and other relatives.

Fulminating. "The crocodile caught him by the foot and dragged him. Breydi screamed for help, but suddenly he disappeared in the waters of the river.

"A few seconds later he came out of the water and screamed that the crocodile had ripped off his foot. And then he said goodbye to his brother Pablo and asked him to say goodbye to his father for him", related 15-year old witness José Fabián Jiménez Cascante.

"We were playing and suddenly my friend screamed "crocodile". When I realized what was happening Breydi was being dragged from side to side and later submerged", said 12-year old Luis Robleto Wilson, another friend who was bathing in the river when the tragedy occurred.

"Goodbye, Pablito, he already tore off a foot. I can't stand it anymore; don't ever bathe in the river again", Wilson said that the victim shouted before disappearing in the jaws of the crocodile.

The incident caused despair among the neighbors who by then had run to try to help him.

The search for the adolescent began soon after the attack and extended to 5:15 p.m. without any results. "We stopped because it was already dark and we were exhausted", stated Ashley Ruiz, a neighbor of San Francisco.

Persons in the community, coast guards and border police officers participated in the operation. Several hotels even provided boats to search for the body of the child.

Indignation. The death of the student also caused pain and indignation among the neighbors, some of whom assured they will search the river from today forward in order to kill the animal.

"We saw how he grabbed him by the head. It was horrible. Later he sunk and we never saw him again," recalled Ashley Ruiz.

Although some locals acknowledged they were aware of the presence of large crocodiles in the Tortuguero River, they assured that until yesterday they had only attacked "dogs and some pigs".

Despite the danger, children always bath in the river behind their parents' back.

"I was at work when they told me that a crocodile had attacked my son. I thought the crocodile had only bitten him, but when I got to the river I saw that the crocodile had killed him", related 44-year old Juan Pablo Escorcia Urbina.

GRIEF

CHILDREN DO NOT OBEY.

NAME: LAURA WILSON

RELATIONSHIP: WITNESS

"WHEN WE HEARD THE SCREAMS, WE CAME CLOSER AND SAW HOW THE CROCODILE CAUGHT HIS HEAD AND SUBMERGED HIM.

CHILDREN DON'T OBEY."

AT FIRST HE DID NOT THINK IT WAS SERIOUS.

NAME: JUAN PABLO ESCORCIA

RELATIONSHIP: FATHER OF THE CHILD

"MY SON ALWAYS BATHED IN THE RIVER. WHEN THEY TOLD ME I THOUGHT IT WAS NOT SERIOUS, THAT HE HAD ONLY BEEN BITTEN OR SOMETHING."

OTHER VICTIMS

8 APRIL 1997. A FIVE-METER LONG CROCODILE KILLED 23-YEAR OLD ISRAELI RONEN GILARD WHO WAS BATHING IN A LAGOON IN THE MONDONGUILLO BIOLOGICAL RESERVE IN MATINA, LIMON. IN THAT INSTANCE, THE ANIMAL CAUGHT GILAD BY THE LEG AND DRAGGED HIM UNDERWATER.

1 MAY 1998. ANOTHER THREE-METER LONG CROCODILE ENDED THE LIFE OF DENIS CHACON AT THE MOUTH OF THE JESUS MARIA RIVER IN TIVIVES, NEAR CALDERA, PUNTARENAS. THE INCIDENT OCCURRED WHEN CHACON WENT IN THE WATER AFTER HIS FISHING LINE GOT STUCK.

16 JUNE 2002. 29-YEAR OLD UBALDO MARTÍNEZ DIED AFTER BEING BITTEN BY A CROCODILE CALLED JUANCHA WHEN HE FELL INTO THE WATERS OF THE TERRABA RIVER WHERE IT PASSES PALMAR NORTE DE OSA IN PUNTARENAS. MARTINEZ, A PANAMANIAN, WAS DETAINED IN THE POLICE PRISON OF PALMAR, FELL INTO THE WATERS OF THE TERRABA RIVER WHEN HE TRIED TO ESCAPE BY OPENING A HOLE IN HIS CELL.

11 APRIL 2005. 13-YEAR OLD ERICK ALEXANDER GUEVARA PASOS DIED AFTER A FOUR-METER LONG CROCODILE ATTACKED HIM WHEN HE WAS BATHING IN THE BEBEDERO RIVER WHERE IT PASSES BY THE TOWN OF THE SAME NAME IN CAÑAS, GUANACASTE. THE STUDENT'S BODY WAS FOUND THE FOLLOWING DAY. HE DIED FROM ASPHYXIA.

8 APRIL 2007. A SIX-METER LONG CROCODILE TOOK 4-YEAR OLD OMAR ELIU LÓPEZ ROCHA WHEN HE WAS BATHING IN THE SAN JUAN RIVER AT THE NICARAGUAN SECTOR OF EL ZAPOTAL, CLOSE TO JOBO DE SARAPIQUI, HEREDIA. YESTERDAY THE BODY HAD NOT BEEN FOUND.

Annex 27

"COSTA RICAN MINE HAS UNLEASHED CONCERN IN NICARAGUA", *MIAMI HERALD* (MIAMI), 21 JUNE 2008

MiamiHerald.com
Posted on Sat, Jun. 21, 2008

Costa Rican mine has unleashed concern in Nicaragua

BY LELAND BAXTER-NEAL

President Oscar Arias' executive order to greenlight a gold mine a few miles from the Nicaraguan border has upset the Nicaraguan government and united environmentalists in both nations.

Arias lifted a six-year ban on open-pit mining for precious metals, saying the nation's environmental laws offer enough protection. Critics, however, say it is evidence that Arias' much-touted environmental commitment runs shallow.

Juana Argeñal, Nicaragua's environment minister, has called on Costa Rica to suspend the newly approved mine, expected to pour millions into Costa Rican government coffers over five years. Argeñal said the mine would pollute the San Juan River, which forms a natural border between the two Central American nations less than two miles from the mine site.

"We, the ministry, declare ourselves completely against it because once it enters into operations, the environmental impact for Nicaragua will be huge," Argeñal said.

The San Juan River is dotted with small fishing communities and is home to an abundance of wildlife. The river also connects to the expansive Lake Nicaragua, considered the country's future source of drinking water.

215 FEET DEEP

The gold mine, named Las Crucitas after the closest of a scattering of tiny, poor border communities in the remote region, will open a pit 215 feet deep and use cyanide to separate gold from ore.

Argeñal argues that the mine needs approval from Nicaragua's government because of potential cross-border environmental effects.

Costa Rica's foreign ministry insists that authorizing the mine is a "sovereign act" and that Nicaragua's calls to suspend the project are ``inappropriate."

Nicaragua, the Costa Rican government claims, has seven such mines in operation, plus 60 metal mine concessions and 15 foreign companies carrying out explorations. Authorities could not confirm Friday if any of these mines were located on or near the border.

Costa Rica's Environment Minister, Roberto Dobles, told The Miami Herald that Nicaragua has nothing to worry about from the Crucitas mine

"Costa Rica has some of the best environmental legislation," he said. ''We make sure nothing happens in Costa Rica, and if nothing happens in Costa Rica, nothing will happen in Nicaragua."

Environmentalists, however, remain skeptical and point to a nearly disastrous mining accident last October.

MINE DISASTER

Bellavista, the country's only operating open-pit gold mine, located near the town of Miramar west of the capital, was shut down after heavy rains triggered landslides that destroyed the mine's million-dollar processing plant and threatened to tear liners designed to keep cyanide from seeping into the ground.

The conflict over the Crucitas mine is the latest flare-up in an often-strained relationship between the two countries, where the San Juan River has long been a sore spot.

Although the river belongs to Nicaragua, Costa Rica has limited -- and disputed -- navigational rights. Costa Rica's claim to navigational rights is currently being contested before the International Court of Justice at The Hague.

PLAN CONDEMNED

Environmentalists' concerns, however, bridge the historic animosity between the two nations.

The day before Arias' April 23 announcement that the Crucitas mine would be permitted, a group of environmental organizations from Nicaragua and Costa Rica met in the Nicaraguan capital of Managua and issued a declaration condemning the anticipated decision.

Costa Rican environmental authorities say Crucitas will be strictly monitored by an independent, internationally certified monitoring firm, while another laboratory will regularly test all water used by the mine and in the surrounding area to watch for potential contamination.

The concession to the Crucitas mine is held by a Canada-based gold mining firm that this month changed its name from Vannessa Ventures to Infinito Gold.

Andrés Soto, a spokesman for the firm's Costa Rican subsidiary, said the property is still being prepared for construction and the mine is not likely to begin operations before September 2009.

When it does begin, it will draw an estimated 76,000 ounces of gold from the earth each year for five years, for an estimated total of 380,000 ounces. At current prices, which have been rising along with the cost of oil, Crucitas would earn Infinito Gold more than $335 million.

After years of court battles and vocal opposition from national environmental groups and local community organizations, Arias gave the mine the go-ahead after Infinito Gold scaled down its plans and beefed up its promises of environmental and social aid.

NO CHEMICAL LEAKS

Once pulled from the earth, the gold will be put through a series of six chemical baths of cyanide to separate it from the ore. According to Soto, the whole process is "a closed circuit" where the cyanide is eventually destroyed and no chemicals are released into the environment.

In addition to pouring millions of dollars into government coffers through taxes and fees, Infinito Gold also has promised to build a series of bridges, fix roads in the area, employ 230 workers, reforest more than 90 acres and fund improvements to local schools, among other social programs.

Annex 28

FOLKMAN, JR., DAVID I., *THE NICARAGUA ROUTE*, SALT LAKE CITY, UT: UNIVERSITY OF UTAH PRESS, 1972 (EXTRACTS)

(...)

(-115-)

In addition to financial difficulties, the directors had to come to grips with a problem that threatened to end all navigation by way of the port at San Juan del Norte. In the years 1851 to 1857 over twenty-three feet of water flowed over the bar at the entrance to the harbor, and vessels of all sizes easily entered the port. During these years the ocean steamers anchored inside the harbor just off Point Arenas while the river steamers pulled alongside to discharge and take aboard passengers. However, by the time the company reopened the route in 1862, it was apparent that the alluvial growth which had created the point of land called Point Arenas was slowly filling up the harbor. At that time the company felt confident that it could restore the harbor. Then in July of 1863 an earthquake lifted the bar at the entrance of the harbor and reduced the water depth to less than ten feet. After this occurrence the ocean steamers and large vessels had to remain outside the bar. Inclement weather sometimes caused delays of several days in transferring passengers to the river steamers. In addition, the raised bar restricted the flow of water out of the San Juan River and increased the rate of build up of sand bars in the harbor and lower river. As the silt became deeper, the water diverted more and more

(-116-)

through the Colorado branch flowing through Costa Rica. In 1848 some nine-tenths of the water had flowed out the lower San Juan; by 1865 eleven-twelfths of the water flowed through the Colorado branch to the ocean. Unfortunately, no harbor existed at the entrance to the Colorado branch, and the combination of silt deposit and restricted flow of water made the lower San Juan almost impossible to navigate during the dry season. In March 1865 the river steamer *City of Granada* struck a reef below Castillo Viejo and sank. Fortunately the passengers and their baggage were saved, but it took them six days to cross the isthmus. With grass growing where Captain Hollins had anchored the *Cyane* to bombard Greytown, and the lower San Juan becoming increasingly more difficult to navigate, the company faced the decision of either finding another port or dredging out the harbor. It considered both possibilities."

In January 1865 the company engaged the services of a party of engineers, detached from the Coast Survey Department of the United States government, under Captain G. C. F. West to make a thorough

survey of the San Juan River and the harbor at San Juan del Norte. Captain West reported that further use of the lower San Juan and the harbor would necessitate turning part of the water flowing out the Colorado branch back into the San Juan and building some artificial means to prevent the further decay of the harbor after restoring it for use. In lieu of this expensive and difficult endeavor, he suggested that the harbor at Monkey Point, forty miles to the north, could be put in excellent condition and that the Colorado branch would require very little improvement, five feet being the least water in the dry season. Francis Morris, then president of the company, concluded from Captain West's report that it would be hopelessly expensive to restore the harbor at San Juan del Norte and therefore suggested in a letter to the stockholders on September 6, 1865, that they adopt West's alternative plan. He foresaw the ocean steamers docking in the harbor at Monkey Point in all kinds of weather, transporting the passengers to steamers adapted to crossing the thirteen feet of water at the bar of the Colorado branch, a second transfer a good distance up the river to river steamers, and continuance across the transit."

(...)

Annex 29

GONZÁLEZ VILLALOBOS, PAULINO, *THE SARAPIQUÍ ROUTE: A SOCIOPOLITICAL HISTORY OF A ROAD*, SAN JOSÉ: INSTITUTO DE INVESTIGACIONES SOCIALES, UNIVERSIDAD DE COSTA RICA, 1976 (EXTRACTS)

that Hale offered to populate, which became known, subsequently, as "the Mountain of the English". He also offered to form a colony between the San José and Hermoso Rivers. Finally, he offered to build a canal that would connect the river Sarapiquí with the San Juan.[48]

Mr. Hale's company was nothing more than an idealist project. There was no new attempt to colonize the zone until years later.

4. THE ALAJUELA COMPANY (1827-1830)

As we have already stated, the interest in the Sarapiquí route was not limited to trade with Nicaragua, but extended to a more important purpose, a way out to the Atlantic. The Costa Rican government, for the purpose of increasing interest in the construction of this road, issued a decree (12 March 1827), offering $500 in money and $1,000 in land, to the person who discovered a road to the San Juan.[49] This led a group of businessmen in Alajuela to attempt a new expedition to the zone, for which purpose they requested authorization from the municipality of Alajuela.[50]

These businessmen used for their first incursion "some vestiges of the trail of the defunct citizen Franco Saborio..."[51]

One of the commissioners, Mr. Miguel Alfaro, made the first expedition on August 7.

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(48) GOMEZ URBINA, Carmen Lila. Opus cit. p. 99.

(49) National Archives. "Expediente sobre descubrimiento de la vereda a Sarapiquí y río navegable a la ensenada de San Juan, su reconocimiento por el Gobierno y demás efectos subsiquientes". In Revista de los Archivos Nacionales. Year IV, No. 5 and 6 (1940), p. 291.

(50) Idem. p. 292.

(51) We have not found any other reference on the expedition of Mr. Saborío. Ibidem.

In spite of the difficulties, a small flow of merchandise began to develop by means of the path opened by the Alajuela company. There is specific news about the passing of 18 mules with tobacco for Nicaragua in 1828.[55]

In spite of the problems faced, the government awarded the entrepreneurs in accordance with that legislated, but not without first recording that:

> "…although the fact is not exactly in accordance with the tenor and purposes of those laws, for it is a comfortable path but rather hardly practicable for the transport of burdened steeds."[56]

Clearly, significant capital investment would be required to convert this path into a road useful for trade, and such resources were not available at that time.

Because of the effects of the Alajuela company (together with those carried out subsequently by Don Pío Murillo from Heredia), factors such as those listed below began to influence the determination of the starting point of the road to Sarapiquí:

- the struggle for economic and political hegemony; a struggle that arose between the incipient bourgeoisies of the main cities in the Central Valley;
- the fight to achieve a monopoly of access to the sole route for foreign trade.

Von Frantzius notes the following about this situation:

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(55) FRANTZIUS, Alejandro Von. Opus cit. p. 19.
(56) National Archives. Congress. Document No. 839.

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(…)

the benefits stipulate by law.[61]

In 1835, the government sought to give new momentum to the route, ordering its rectification and widening to up to four yards. However, the civil wars put an end to these objectives.[62]

Parallel to the latest expeditions, a serious attempt to colonize the plains of Sarapiquí developed. The Frenchman Alfonso Dumatray founded a company for said purposes, taking advantage of the decree of June 3, 1828.[63] The project included the formation of a cattle ranch, sugarcane farms, a mill and distillery. Cattle ranching did not yield the expected results, but the production of sugars and alcohols had great initial success, and it was necessary to increase the area cultivated with sugar cane each year.[64] In only the second year of operations, a total of 15,000 "quintales" of sugar and 48,000 liters of rum were produced, returning 500% of the invested capital.[65] For these purposes, modern machinery had been imported, of which there are still some remains.[66] In addition to the products listed above, there were four corn harvests per year, as well as plantain raising. The destination of this production was San Juan del Norte. However, the lack of labor, difficult land access to the interior and unhealthiness of the climate wreaked havoc on the enterprise, and in 1838 it was almost […]

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(61) FRANTZIUS, Alejandro Von. Opus cit. p. 24.
(62) Idem. p. 22.
(63) GOMEZ URBINA, Carmen Lila. Opus cit. p. 101.
(64) MELENDEZ CHAVERRI, Carlos "San Alfonso. La primera hacienda en la colonización de las llanuras de Sarapiquí." In Orbe, No. 140, Year 25 (1982); p. 21.
(65) FRANTZIUS, Alejandro Von. Opus cit. p. 20-21.
(66) GOMEZ URBINA, Carmen Lila. Opus cit. p. 101.

CHAPTER IV

2nd Phase: Marginalization of the Sarapiquí Route Project, 1836-1846

1st. THE MAJOR CHANGES

During the period of 1836-53, a series of qualitative changes took place within Costa Rican society that simultaneously increased the need for the road to Sarapiquí and generated contradictory processes. The determining element of these transformations was the dramatic development of coffee cultivation. This process had begun in 1832 with exportation to Chile. Years later, it would accelerate through direct trade with England and especially with the injection of financial capital from said nation.[68]

The coffee boom created a rapid process of change in land use within the Intermountain Central Valley. Subsistence farming and formerly hegemonic products (sugarcane, tobacco and wheat) were replaced by coffee, and their cultivation was marginalized to peripheral zones of the Valley. In this way, a monocultivation system was developed a system that, to a great degree, was promoted externally by English capital through the advance financing method for coffee harvests.[69]

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(68) FACIO, Rodrigo. Estudio sobre economía costarricense. 2nd edition, San José: Editorial Costa Rica (1975); p. 43.

(69) Idem. pp. 47-48.

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> [...] current harvest. At this pace, these beautiful coffee plantations, these valuable and extensive agricultural fields, this mercantile movement and all of these improvement projects, signs of a flattering future, would soon disappear, leaving poverty and demands that would stir up passions and convert Costa Rica into a theater of calamities, disorder and despair"[129]

Given these conditions, the construction of a road to the North was urgent. To this effect, the President ordered the Directorate to carry out all necessary reconnaissance for the road's construction.[130] Immediately, a commission was formed, composed of several members of the Directorate and the "practical" Manuel Sancho.[131] As of that point, work on the route to Sarapiquí was encouraged, to the extent that Faustino Montes de Oca was named Superintendent of the road to the North.[132]

During the same year, an expedition was sent to the Toro Amarillo River to determine whether this river was navigable. The results were negative.[133]

However, all of the work to be carried out toward San Juan del Norte would be in vain unless a favorable agreement could be reached with Nicaragua. In 1848, the Costa Rican government communicated its intention of opening the Sarapiquí route to the government of Nicaragua, also stating that, for said purposes, it would send a delegate to sign a trade agreement. Nicaragua's exceedingly violent response threatened to break off relations if Costa Rica insisted on constructing the road

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(129) CASTRO MADRIZ, José María. "El General Presidente del Estado de Costa Rica a sus habitantes" in El Costarricense, May 18, 1848; pp. 360-361.

(130) Official. "S.E. El Benemérito General Presidente del Estado se ha servido expedir el decreto que sigue" in El Costarricense, May 18, 1848; p. 361.

(131) National Archives: "Actas de la Junta Directiva de la Sociedad Itineraria 1847-1848" in Revista del Archivo Nacional, Year No. 1-12, p. 236.

(132) Idem. p. 237-247.

(133) Idem. p. 249.

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without a prior arrangement regarding the border question.[134]

Costa Rica sent Felipe Molina to act as delegate before the Nicaraguan government to discuss the problem of the road and the border question. However, the new negotiations would end in categorical failure. Nicaragua sought control over the water channel and surrounding territories, whereas Costa Rica, in addition to a route to the Atlantic, was hoping to conserve its territorial integrity.[135]

The Nicaraguan government proposed the following as a dividing line:

> "… a [line] that, beginning at the point of Descartes on the Pacific and continuing along the southern beach from another point, taking a direct line in separating from the beach toward the inlet of the Refugio River in the great lake of Nicaragua (whose river is the same near that over which the Frenchman D. Luis Chevan held possession), continuing from there along the bank of said lake to the Frío River, and from there rising by said river eight leagues then taking a line parallel to the San Juan River, at which point always with a distance of said eight leagues from the banks of the San Juan, until touching upon the Sarapiquí River where, dropping the same eight leagues and arriving at the San Juan River, it will continue first along the right bank of this river to the

> branch called Colorado, and continuing from there along the right bank of this river to its mouth in the Atlantic"[136]

This proposal was unacceptable to Costa Rica, which proposed the following limits:

> "... the point of Descartes on the Pacific and continuing along the southern beach of said point, taking a direct line upon separating toward the mouth of the Refugio River in Lake Nicaragua, and the bank of this [lake] to the San Juan River, from there the southern border of said river to the Colorado, and taking the bank of this river to its mouth in the Atlantic."[137]

In addition, Nicaragua never recognized Costa Rica's rights to navigation and sought to impose heavy taxes on the transport of Costa

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(134) OBREGON, Clotilde. Opus cit. p. 52.

(135) Idem.

(136) National Archives. Foreign Relations. Box No. 18. Document No. 19b.

(137) National Archives. Foreign Relations. Box No. 18. Document No. 18.

Rican merchandise, and on merchandise coming to Costa Rica from other latitudes.[138]

In anticipation of the failure of this mission, a series of diplomatic maneuvers were developed, in which there was serious foreign intervention — intervention that was ultimately determined by problems of a geopolitical nature.

During the 1840s, the San Juan basin was a point of international conflict. England and the United States sought to control it in order to build an inter-oceanic canal. For England, control was fundamental in order to maintain commercial hegemony over Latin America. Construction of the canal would make it unnecessary to sail around Cape Horn, thereby facilitating communication with countries of the Pacific. For its part, the United States sought to challenge British hegemony within its own "backyard." In addition, due to the discovery of gold mines in California on January 24, 1844,[139] and the resulting migratory current toward this region, control over this route was of vital importance to the United States in order to encourage the transport of labor toward the country's new western territories.

Great Britain, using its allies the Zambos-Mosquitos and mobilizing military detachments in Belize, threatened Central America's Atlantic coast from the early 1840s. In a joint expedition in 1848, they took the port at San Juan del Norte, among other sites.[140]

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(138) OBREGON, Clotilde. Opus cit. pp. 58-80.
(139) VILAR, Pierre. Oro y moneda en la Historia (1492-1930). Barcelona, Ariel (1970); p. 466.
(140) OBREGON, Clotilde. Opus cit. pp. 147-148.

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(...)

to build roads: some through Matina, and other through San Carlos.[150]

Lacking economic resources with which to carry out its own construction efforts, the government encouraged capital dispersion, promoting the formation of shareholder companies to build roads. As was to be expected, these companies did not gather the capital necessary for operations, as in the case of Sociedad Itineraria del Norte when it attempted to build a highway to Moín and Limón via the Matina route.[151]

The new system of private companies had been tested successfully in other regions.[152] It consisted in the state's cession of lands and tolling rights to the contracting party.

One of the attempts to replicate this system was the Sarapiquí Company. On October 27, 1851, a decree was issued authorizing the constitution of a company of twenty partners with capital totaling 60,000 pesos, for construction of the road to Sarapiquí.[153] According to the terms of the contract signed by the partners, they committed[154] to: building a bridle path between San José and the pier of the Sarapiquí River within a period of eighteen months, and then a highway twenty yards wide, similar to that of Puntarenas, within eight years. For its efforts, the company would receive:

1- one thousand yards of land on each side and along the length of the part of the road passing through vacant land […]

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(150) FRANTZIUS, Alejandro Von. Opus cit. p. 22-23.
(151) AVILA BOLAÑOS, Olger. Opus cit. pp. 362-367.
(152) LACOUR-GAYET, Robert. La vida cotidiana en los EEUU en vísperas de Guerra de Secesión. 1830-1860. Buenos Aires. Lib. Hachette (1965); p. 53.
(153) Cf. Annex No. 1.
(154) Cf. Annexes No. 1 and No. 2.

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(…)

proposal that was initially rejected by the partners.[160] In 1853, however, when the economic situation was very difficult for the Company, they accepted ceding to the North Americans the right to establish a navigation company,[161] a company that was never established.

Construction of the road was implemented with very few human resources. The technical teams were limited to a civil engineer (Luis Charmier[162]) and the foremen. The rest of the workers were unskilled laborers.

The lack of labor was one of the main obstacles, and its effects were felt from the beginning of the efforts. As of April 1852 there were reports about:

> "…the lack of workers is felt more every day, which is a very sensitive issue for our enterprises."[163]

This problem became worse over time and, in the end, there was a severe lack of unskilled labor.

The technical engineering work was apparently deficient. Only a few years later, in 1864, Gindlach and Gallinier affirmed the following:

> "The engineers formerly employed (on this road) seem to have neglected to make the corresponding maps. Therefore, there is no data upon which to form an opinion about whether or not the current artery has been placed

> on the most favorable line in terms of length and slope."[164]

Land reconnaissance work began on December 6, 1851. Thursday, December 10, would be the day of the official inauguration of the

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(160) "Camino a Sarapiquí." In La Gaceta. September 25, 1852; p. 2.
(161) "Vapores en el Sarapiquí." In La Gaceta. October 1, 1853; p. 3.
(162) La Gaceta. May 15, 1852; p. 3.
(163) "Camino a Sarapiquí." In La Gaceta. April 3, 1852; p. 3.
(164) National Archives. Fomento No. 1708.
(165) La Gaceta. December 13, 1851; p. 2.

work.[166] Progress occurred very quickly, and by April 1852 more than one third of the highway had been built. By the next month, the path had reached the pier, and it was estimated that only one more year would be necessary to complete the work.[167]

The work was abandoned in August 1853, having achieved the following: construction of a mule path to the pier, thereby complying with part of the contract, and construction of a highway to El Desengaño[168], failing to meet the agreement.

Road quality was not good. Shortly after the work had stopped, travelers who used the road referred to its poor conditions. Traveling in July 1853, Wilhelm Marr noted the following about the section between El Desengaño and Vara Blanca (which was not exactly the worst part):

> "Our mounts trod over the mud as rapidly as snails attempting to catch a horse, but unable to move any more quickly."[169]

The situation was no different at lower elevations:

> "On both sides of the 'path' the thicket often reached a height of fifty feet and more, but the mud increased as well — the soft and deep mud into which our animals sank positively up to their bellies every eight or nine steps. Since the mail passes over this trail only once per

> week, the vegetation has time to grow strongly at many points along the narrow transitable strip. The branches swing back after being pulled by the preceding rider, frequently whipping the face of he who follows. But worst of all were the reeds that constantly tangled in the mules' legs, such that they fell every so often like lassoed prey."[170]

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(166) "No oficial" La Gaceta. December 20, 1851, p. 1.

(167) "Camino a Sarapiquí." In La Gaceta, April 3, 1852, p. 3; and La Gaceta, May 15, 1852, p.3.

(168) "Dirección de la compañía de Sarapiquí." In Boletín Oficial, November 24, 1853 p. 6.

(169) MARR, Wilhelm: "Viajes a Centroamérica." In Costa Rica en el S. XIX, Anthology by Ricardo Fernández Guardia, 2nd Edition, San José: EDUCA (1970), p. 252.

(170) Idem. p. 257.

The services provided by the new route were of little relevance, limited to the trade of luxuries, the carrying of news and contraband activities.

The volume of imported trade passing through customs at Sarapiquí in 1856 gives us an idea of the limited transport over this route. Merchandise worth only 9,471 pesos was imported, out of a total import volume of 113,564 pesos.[171]

As a means for the transportation of news from the exterior for publication in the official press (under the name "Correo de Sarapiquí"[172]), the route was of significant use. In this way, Costa Ricans learned about the main overseas economic and political occurrences.

Contraband activities were apparently frequent in this zone. This was one of the reasons put forward when the customs office was closed in 1860.[173]

As a result of the sale of properties adjacent to the route, slight colonization developed from El Desengaño to San Miguel.[174] In 1870, these settlers pressured the government to provide them with 1,000 pesos annually to repair the local road.[175] However, the small settlements must have been populated with small farmers, for in 1888 it was affirmed that there was no labor force or capital to exploit it in the North.[176]

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(171) SQUIER, Ephraim George: "Los Estados de Centroamérica." In Costa Rica en el S. XIX, Anthology by Ricardo Fernández Guardia, 2nd Edition, San José: EDUCA (1970), p. 290.
(172) Publication began in La Gaceta of May 19, 1853, p. 2.
(173) National Archives. Congreso No. 6911.
(174) FRANTZIUS, Alejandro Von. Opus cit. p.23.
(175) National Archives. Fomento No. 115.
(176) National Archives. Congreso No. 9531.

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With respect to the diagnosis of the situation, the studied case allows one to observe how, during the first fifty years of independent life, the design of development plans was marked by the impression of improvisation. The reliability of the available information differed for qualitative and quantitative reasons. Additionally, the processing of these lacked technical criteria and in sum led to mechanically linking them with the general postulates of liberalism in order to justify the project.

The lack of reliability of the data is due to the manner in which they were collected. During those years offices specialized in those tasks did not exist, and the information used for the plans came from a pre-scientific perception of certain needs acquired by the fractions that the economic and political hegemony of the society disputed. These perceptions arose from the experience acquired in the social production by each group, and therefore reflected very specific interests. Due to these characteristics, the information was fragmentary, intuitive and aimed at the subjective ends of its producers, making it very difficult to conduct an objective fact-based study.

To achieve these purposes was to legitimize the proposal through the mechanical application of the doctrinaire principles of liberalism to the facts. In this way, as these principles were the philosophical source of the juridical-political order in effect, they justified the project on the basis of the principle of the common good, or, on the basis of the ends

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Annex 30

HOUK, RICHARD J., "THE DEVELOPMENT OF FOREIGN TRADE AND COMMUNICATION IN COSTA RICA TO THE CONSTRUCTION OF THE FIRST RAILWAY", *THE AMERICAS*, VOL. 10, NO. 2, 1953, OCT., PP. 197-209 (EXTRACTS)

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THE DEVELOPMENT OF FOREIGN TRADE AND COMMUNICATION IN COSTA RICA TO THE CONSTRUCTION OF THE FIRST RAILWAY

THE COLONIAL PERIOD (1563-1821)

THE POOREST, THE MOST ABANDONED, the most isolated of the Spanish possessions in North America was the province of Costa Rica. Despite valiant efforts made by the royal governors to build roads and to stimulate the production of items for export, the colonial history of the nation indicates a vegetating and unstimulated economy. The smallest settlements made by the Spaniards were scattered throughout the country, and the greatest concentration of population was in the fertile Meseta Central, which had no easy access to the sea. All of the early settlers were "miserably poor with no prospect of finding mines to bring them quick wealth, no export crop in demand in world markets, and no means of bringing such a crop to the coast had it existed."[1]

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[1] Chester Lloyd Jones, "Costa Rica and Civilization in the Caribbean," University of Wisconsin Studies in the Social Sciences and History, Number 23, p. 21.

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(...)

The high prices of the Spanish imports and the lack of corresponding exports gave rise to a contraband trade with the English, once the latter had abandoned their destructive forays upon the cacao areas and the Atlantic coastal settlements. During June and December, when the fruit of the cacao tree was being harvested, the owners of the coastal plantations would come down from their homes in the interior ostensibly to direct these operations but chiefly to engage in contraband commerce. Tortoise shell, dyewood and sarsaparilla were exchanged for British merchandise. These transactions were neither regular nor of great financial value, but the authorities in Madrid brought about its eradication.

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[2] Rodrigo Facio, *Estudio Sobre Economia Costarricense* (San Jose, 1942), pp. 12-13.

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In spite of these efforts Costa Rica ended its history as a province of the great Spanish Empire in 1821 a poverty-stricken nation, almost wholly without roads and schools, without a printing press, without any governmental funds and without any foreign commerce save for the small exchanges made by overland routes with its neighbors, Panama and Nicaragua. Its small population, the difficulty of communications, and the depredations of the Mosquito Indians and the European "pirates" were the causes which retarded its progress and kept it practically isolated from the markets and progressive ideas of Europe and America.

The results of this isolation are well described by John Hale, an Englishman who visited the republic in 1826.

The little commercial exchange which this province has had with other parts of the world is revealed by the following: the scales are made of coarsely carved wood, while the weights are rocks that are picked up from the street and tested in some store. The people look upon foreign products as miraculous articles; not even the wheelbarrow has been imported here; they have no ideas of the cooper's products; they do not use the spinning wheel, and the machines for sowing cotton and cleaning coffee would be a novelty. In the whole province I have not seen a single tub. In short, there are hundreds of modern inventions and articles of daily use of which they are absolutely ignorant. . . . The few craftsmen found in Costa Rica have to use the most roughly made tools, and it is surprising that they can use such inconvenient implements. In order to make a table they have to use a whole tree. . . . A saw mill would be a thousand per cent benefit! The doors and window frames have never been painted because in all the country there is no paint, no turpentine, no oil. . . . It is true that because the citizenry feel the greatest desire for progress

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(...)

INDEPENDENCE TO THE CONSTRUCTION OF THE FIRST RAILROAD
(1821-1870)

Once the province had become an independent republic and free from the imposition of fiscal and political economic controls foreign to the national need, Costa Rica began to augment its incipient foreign trade. Wheat was the principal export, but neither was the quantity sufficient nor the prices such as to accelerate its production. The same was true of brazilwood and mineral products. Unconsciously setting the stage for the impending development of the coffee industry in Costa Rica, the early governments proclaimed all manner of decrees favorable to the development of foreign and domestic commerce. Free trade with all friendly nations, the rehabilitation of the seaports of Matina and Puntarenas and the development of a system of roads linking the principal centers of the Meseta Central with the aforementioned ports were a few of the wise measures adopted.

The credit for the initial propagation of coffee in Costa Rica is divided between the Spanish governor Tomas de Acosta and the Franciscan Padre Felix Velarde. The plant is known to have existed in Costa Rica in 1804, and in 1811 Padre Velarde had planted his land near San Jose in coffee trees. His faith in the future development of the coffee industry inspired many of his neighbors to follow his example, and by 1821 over 17,000 coffee trees had been planted in the distant valley of Matina. In that year the town council of San Jose, after having made a free distribution of coffee seedlings to the poorer citizens, made an extensive distribution of unsettled lands to those who lacked the proper lands for coffee cultivation and thus initiated a new and prosperous phase in the economy of the republic.[8] Ten years later it declared that those who would cultivate other public lands in coffee for five years could declare them private

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[6] John Hale, "Seis Meses de Residencia y Viajes en Centro America, Etc.," in Ricardo Fernandez Guardia, *Costa Rica en el Siglo XIX* (San Jose, 1929), pp. 27-28.

[7] Facio, *op. cit.*, p. 23.

[8] Alberto Quijano Quesada, *Costa Rica Ayer y Hoy* (San Jose, 1939), p. 453.

property. The following year the town council of Cartago was moved to similar action.[9]

The first recorded exports of coffee were in 1820, when two shipments of one quintal each were made via Puntarenas to Panama. The first commercial shipments of any value were made in 1832 by George Steipel, a German merchant established in Puntarenas who sent some 50,000 pounds to Valparaiso, Chile. This traffic to Chile for transshipment to European markets rapidly increased within a few years and by 1841 approached 90,000 pounds.[10]

Fortunately for Costa Rica, the head of the government during much of this critical period was Braulio Carillo, a farsighted man who did not hesitate to use dictatorial methods if he believed them necessary for the national welfare. He made two forced loans of 15,000 pesos each to finance the construction of a new route to Matina and also rehabilitated the ports for increased foreign commerce. He announced an export tax on each quintal of coffee to be used for the upkeep of the roads and granted public lands along the trails to Matina, Terraba and Sarapiqui to those who would plant them in coffee, cacao, indigo, cotton or pasture. He also granted various lands in the provinces of San Jose and Cartago, especially in the Pavas district, to those who would plant them in coffee.

The progress of the coffee industry in Costa Rica became known to an English merchant-ship captain, William Le Lacheur, who visited the nation in 1844-1845. He became convinced that the establishment of direct service from Puntarenas to Great Britain would be economically profitable and inaugurated such a line after a conference with leading coffee producers in San Jose. They authorized him to invest their share of the profits in merchandise to be purchased in England and brought on the return trip for sale in the republic. Great Britain became almost the exclusive market for Costa Rican coffee; and practically all of the foreign trade was carried on in English ships until 1849, when the Panama Mail Line established service between Puntarenas and California.

The road to Matina had been open since colonial days, but there were no bridges nor other means of crossing the torrential rivers flowing down into the Atlantic or of traversing the extensive swamps along the Caribbean coast. The 180-mile trip between San Jose and the Atlantic took thirty days and utilized several methods of transport. First, one went by cart to Cartago and then on horseback to Matina. From there to the mouth of the Matina River rude rafts of balsa transported freight and passengers. The last stage of the journey to the roadstead of Moin was made by mule. The transport cost alone of a hundred pounds of merchandise over this route was not less than six pesos and double that amount for passengers.[11]

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[9] *Ibid.*, p. 454.
[10] Facio, *op. cit.*, p. 23.

The heavy rainfall of this northeastern coast made the climate so unhealthy that it was practically impossible to induce Costa Ricans either to perform the labor necessary to create a thru road to the coast or to settle in areas suitable for ports on the Atlantic. The average length of the voyage from the Pacific coast to the European market was at least five months via Cape Horn, while from Matina the time was generally six weeks and the freight charges but thirty or forty shillings per ton instead of five pounds! Even after 1855, when the exports were transshipped over the Panama Railway to the Atlantic, the delay and freight rates were alarming. The good port of San Juan in Nicaragua was even closer to San Jose than either Matina or Puntarenas, and the trip from there to Europe in 1844 did not exceed forty or fifty days by sailing ship or twenty by steamship. For a time it seemed that the British government might take possession of that port in virtue of its many reclamations in favor of the Mosquito Indians. Had this occurred, it might have become the only port used by Costa Rica, for its favorable location and more healthful climate made it far more advantageous than either Matina or Puntarenas.

The almost complete lack of traffic over this route was well described by the French minister, Felix Belly, who landed at the Costa Rican river port of Sarapiqui in 1858.[12] From San Jose to this port was a journey of thirty-six miles, which had to be covered partly by mule and partly by rude canoes. M. Belly found the sole official was a captain of the port. He had neither a soldier nor a subaltern. He lived in a house without furniture, only half enclosed with canes, and he slept in the attic. This official estimated the weight of goods entering annually at one hundred tons. As it was not a customs port, he issued passes for goods, and the duties on them were paid upon their arrival in San Jose. The capital was reached only after a long and arduous journey, for the road had to be opened with a machete.

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[11] Soley Guell, *op. cit.*, p. 45.
[12] *Ibid.*, p. 45.

Turned back from the most logical routes to their markets by a combination of climatic, physiographic and political obstacles which they were not yet strong enough to surmount, the coffee planters of the plateau were forced to ship their coffee from the less advantageous but more hospitable Pacific coast. The overland route to the entrep& of Panama had lost its utility because of the diminution of the export of mules and the disappearance of the exchange of Central American products for European merchandise at that market city. When the establishment of regular service between Costa Rica and other nations bordering on the Pacific was attempted, the successive governments of the republic did their best to expedite the export of coffee.

The first choice of a seaport on the Pacific was Caldera, a little creek bed almost due east from the tip of the Nicoya Peninsula. It was not a wise selection as the following description of an event that occurred in 1840 shows:

> On the beach there was a long low house with a tiled roof and mounted on piles; near it were three or four huts and two canoes. We anchored in front of the houses, apparently without being noticed by a living soul. In the afternoon, the captain of the port took me to shore. In the first house we saw two candles burning before the body of a man. Everyone that we met was sick with fever and complained that the place was almost deserted; and notwithstanding its advantages as a port, a few days later the government ordered it abandoned and the port to be established again in Puntarenas.[13]

The old port of Puntarenas was located on a long sandy peninsula north of the creek bed, or Caldera. Once the rehabilitation of the port had begun, a cart road was constructed to connect it with the coffee regions of the interior. It was no easy thing to connect that tongue of sand with the Central Plateau, for the road had to pass over Mt. Aguacate (2,000 meters high) on its 130-mile length. In 1857 M. Belly declared:

For twenty years they have been working on this [road] ; they are still

> working on it under the direction of the German engineer in charge of public works and the road service since 1843. There has resulted a road primarily connecting the various towns, macadamized in part, and the "Royal Road" of the travelers and the carts."[14]

The upkeep of this road was based on an annual budget of 20,000 pesos. There was an export duty of one real on each hundred pounds of coffee which provided this income, and there were several private donations towards the construction and upkeep of the road made by interested coffee producers.

Year	Amount of Coffee Exported from Costa Rica
1832	50,000 lbs.*
1845	5,000,000 lbs.*
1853	8,000,000 lbs.*
1855	7,170,615 lbs.
1859	10,011,695 lbs.
1865	13,652,437 lbs.
1868	20,693,899 lbs.
1872	25,479,665 lbs.

TABLE I. Coffee Exports from Costa Rica, 1832-1872

These figures are from Rodrigo Facio, *Estudio Sobre Economia Costarricense* (San Jose, 1942), pp. 23 and 25; and Ephraim Squier, "Los Estados de Centro America," in *Costa Rica en el Siglo X/X*, by Ricardo Fernandez Guardia (San Jose, 1929), p. 243. The asterisk (*) denotes an estimate.

Once coffee production had received the stimulus of direct export service to Great Britain, coffee plantings increased tremendously and exports zoomed to new heights each year. (See Table I.) Despite the political unrest of 1848 and the consequent displacement of the European market, despite the internal political struggles which occurred in Costa

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[13] John L. Stephens, "Incidentes de Viaje en Centro America," in Fernandez Guardia, *op. cit.*, p. 44.

Rica centering on the schemes of Morazin, despite the effects of the War against the Filibusters upon Costa Rica at this period, more and more coffee was sent to the foreign market. The constant struggle against unadvantageous routes of communication had removed practically every other product from the export trade. Even coffee, a crop which was of high value and could be easily transported without undue deterioration, had a bitter struggle in achieving commercial success because of the long and costly voyage around Cape Horn. Most of the other articles of national production either were limited by a fiscal monopoly, such as alcohol and tobacco, or could not secure in the world market a price necessary to cover the high costs of transportation. The predominance of coffee in the Costa Rican exports as early as 1852 can be seen from Table II.

Export	1852 *Value*	*Export*	*1853 Value*
Coffee	$609,984	Coffee	$720,000
Sugar	20,000	All others	45,000
Hides	6,250		
Tortoise shell	3,200	TOTAL VALUE	$765,000
Sarsaparilla	3,200		
Foodstuffs	10,000		
TOTAL VALUE	$652,634		

TABLE II. Costa Rican Exports in 1852 and 1853

These figures are based on Ephraim Squier, "Los Estados de Centro America," in *Costa Rica en el Siglo XIX*, by Ricardo Fernandez Guardia (San Jose, 1929), pp. 242-244.

The price of coffee during the months of February, March and April (the period following the harvest) was eight or nine cents per pound delivered to the Pacific coast. The cost of production once the coffee *finca*

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[14] Felix Belly, "Atraves de la America Central," in Fernandez Guardia, *op. cit.*, p. 483.

had become established (usually three years after the planting of the coffee trees) was from two and one-half to three cents per pound. The cost of transporting the coffee by oxcart to Puntarenas was generally one and one-half to two cents per pound; the carts generally took from four to five days to go down to the port and five to six days to return, depending upon the season. Then there was the export tax of one real per hundred pounds which was used for the upkeep of the cart road to the port. Thus the speculators gained about twenty per cent buying and sending the coffee to the port at their own risk. Often they exchanged the cash profit for manufactured goods or sold the bags in advance, receiving payment half in money and the remainder in imported goods that they could sell in the interior. In the world market Costa Rican coffee was considered inferior only to the best product of the Orient; and in the English market, to which most of it was sent, it realized twenty-two cents per pound.

The coffee was hauled down from the *fincas* of the Meseta Central to the waterfront of Puntarenas loaded into rudimentary oxcarts, which were mounted over two solid wooden wheels hewn from a

single piece of the trunk of a cedar, and were pulled by one or two yokes of oxen. The famous English novelist Anthony Trollope traveled over the cart road in 1859 and was much impressed by the constant traffic.

> I believe that I can give the name of highway to it because the products of the country are carried out for export by oxcarts over this route. However, it is appropriate only for vehicles with solid wooden wheels adequate for the slow and patient speed of the oxen. But during the morning and the afternoon, the rows of carts were incessant. They travel from 4 o'clock in the morning until 10; then they rest until 3 or 4 in the afternoon and again continue their journey for 4 or 5 hours more by taking advantage of the freshness of the late afternoon. All of them are filled with coffee, and give one the idea that the production of that article in Costa Rica must be sufficient to supply the whole world. . . . Neither the men nor the animals grumble as they would do in England, nor do they quarrel over the use of the water nor do they complain of their own bad luck and the good fortune of their neighbor. Drivers and oxen are equally orderly, patient and slow. They spend their lives taking

> coffee to Puntarenas and chewing thousands of sugarcanes![15]

In 1857 Astaburuaga, the Chilean minister to Central America, counted 700 cartloads of coffee and other commercial merchandise on a day's journey over the highway from the capital down to Puntarenas; and it was said that there were from 8,000 to 10,000 of these oxcarts in the republic.[16]

Although Puntarenas had become practically the sole center of contact between Costa Rica and the outside world, the port itself was far from impressive. In 1853 it was thus described by a commercial traveler from Hamburg:

> The aspect which the settlement presents is decrepit enough; and if you except the few large wooden houses situated on the other side of the tongue of sand and look at the huts made of reeds and palms in which the natives live next to the beach, you will believe that you have stopped at a settlement of Indians. Nevertheless a very picturesque wooden light-house, whose lamp was not lit at our arrival because of a lack of oil . . . showed that this was the port of the republic. The city has 1,200 inhabitants and consists of a principal long street, on which are located the commercial establishments, and

[15] Anthony Trollope, "Las Indias Occidentales y el Continente Espanol," in Fernandez Guardia, *op. cit.*, p. 405.
[16] Francisco Solano Astaburuaga, "Repúblicas de Centro America," in Fernandez Guardia, *op. cit.*, p. 259.

> others of secondary importance, on which are located the homes of the citizens. . . . Notwithstanding the fact that Puntarenas is a free port [until 1860], no one is permitted to bring in without governmental permission either tobacco, munitions or liquors. These articles have to pay duty and are deposited in the customhouse. The impression which the little city finally produces is very agreeable. It has some resemblance to the incipient colonies in the United States. . . .

Puntarenas itself is no wider than a third of a mile. The ships drop

> anchor in a roadstead that is entirely safe, and I have never heard of any misfortune caused by a shipwreck. Even when there is a violent "norther", the only destructive wind encountered here, a ship which became unanchored would only be blown out to sea. On the other hand disembarcation is both difficult and costly. The commercial buildings are all on the main street, on the shore of the narrow arm of the sea which bounds the peninsula on the north. In order to reach the point (the tip of the peninsula) and to go toward the anchored ships, it is often necessary to sail a mile, which can be done only in time of high tide . . . and this takes so much time that under such conditions and having to go according to the tide, it is rare that a launch can go and return more than once a day. These launches have a cubic capacity sufficient to carry 100 to 120 sacks of coffee (from 5 to 8 tons); and a trip costs, depending upon the size of the cargo, from 10 to 20 pesos. These put into the Estero (protected harbor) and then some sunburned, herculean lads take the merchandise to the business houses, walking over the deep sand. . . . The muscular strength of the carriers is enormous. One of these men carries, for example, two sacks of coffee of 125 Spanish pounds each from the depository to the launch without stopping and does this for many hours under a temperature of more than 100° F. . . . No responsibility is assumed for the damage which may be caused by the sea water to the goods."

Despite such unfavorable conditions, Puntarenas became an important shipping center and was visited by ships of all nations. When Marr visited it in 1853, he counted twenty ships anchored in the bay.[18] In 1855 the commercial activity of Puntarenas was as follows: ships entering: 85; ships leaving: 67; total tonnage: 25,000 tons; crewmen: 1,226; passengers registering at the port: 600, practically all proceeding from Panama and bound for ports in Central America. The country of ownership and the tonnage from the three leading countries using the port of Puntarenas in 1850 were: Great Britain, with 20 ships of 4,775 tons; the United States, with 13 ships of

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[17] Wilhelm Marr, "Viaje a Centro America," in Ferithidez Guardia, *op. cit.*, pp. 112-115.
[18] *Ibid.*, p. 112.

3,163 tons; and Denmark, with 7 ships of 1,271 tons.[19] Puntarenas had finally come into its own.

THE PREVIEW OF A RAILROAD: THE BURROCARRIL

With the advent of economic prosperity for Costa Rica and the commercial development of the great coffee marketing centers of the Meseta Central as well as the seaport of Puntarenas, there came stronger demands for a shorter and quicker line of communication linking the two areas. Naturally the Costa Rican government hoped to see a railroad built to link the two regions, and in 1857 President Mora granted the concession for the construction of such a railroad to an English company headed by Richard Farrer.[20] At that time along the west coast of America there existed only the eighteen-mile stretch of railroad between Lima and Callao. The company expended some 70,000 dollars on the line and advanced it nine miles beyond Puntarenas toward Esparta, but the ascension of the mountains of Aguacate presented invincible obstacles.

This "preview of a railroad" existed for only a few years because it had no financial income to support its existence and operation. The cart drivers from the interior asked no more to carry a load of coffee to the port itself than to the end of the tramway which was nearest the national road. M. Belly declared:

> There is nothing more modest or more primitive than the installation of this route. There are neither terminal stations nor intermediate stations nor special employees. A track 2 meters wide and 3 meters long is open through the forest, 2 rails placed over tree trunks without any planing, some little wooden bridges whose planks are not adjusted properly, and a half-dozen ominibus coaches provided only with benches and a roof of varnished wood. The requirements of the service do not require a locomotive, because this piece of track without an outlet cannot count upon a great circulation of travellers. Besides the exploitation of the forest resources which is carried on by means of it, the line is used only for trains of excursionists and hunters. Without getting off of the coach, you can shoot deer 2[1]

This tramway or railroad with mule power was popularly called the "burrocarril" in honor of the mules that pulled the cars through the forest at the rate of two miles per hour.

[19] Squier, *op. cit.*, p. 234.

[20] Quijano Quesada, *op. cit.*, p. 581.

[21] Belly, *op. cit.*, pp. 471-472.

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The existence of this tramway encouraged the proponents of a railroad from the interior to the coast to redouble their efforts. The early failure of the "burrocarril" served only to clarify the many financial and physiographic problems which the proposed line would have to solve and thus rendered a more valuable service than its disillusioned English investors suspected. A new era in the development of transportation and communication facilities in Costa Rica was at hand.

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Annex 31

JIMÉNEZ PÉREZ, IGNACIO, *THE MANATEES*
OF THE SAN JUAN RIVER AND TORTUGUERO CHANNELS:
ECOLOGY AND CONSERVATION, MANAGUA:
ARAUCARIA-MARENA-AECI, 2003 (EXTRACTS)

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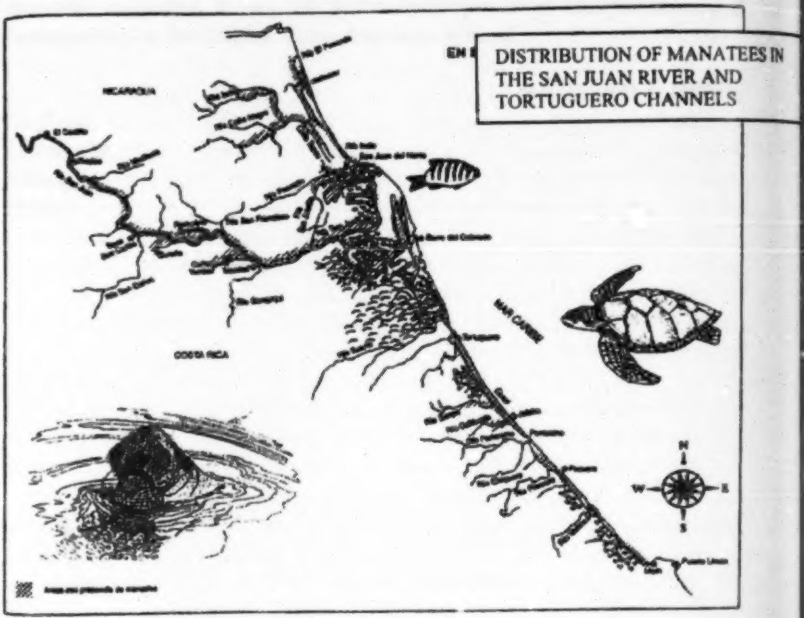
Manatees of the San Juan River and Tortuguero Channels


DISTRIBUTION OF MANATEES IN THE SAN JUAN RIVER AND TORTUGUERO CHANNELS
NICARAGUA
COSTA RICA
MAR CARIBE
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manatees under 60 years of age, which means there is no interest among youth to learn such a difficult and risky technique, finding easier ways to make a living through ecotourism, fishing or drug trafficking. Although manatee hunting has practically been abandoned, in 1996 there remained one active hunter of these animals in the community of Barra de Colorado. It is not known how many animals this hunter killed, although the number certainly did not exceed two per year. It is also not known whether the hunter currently remains active.

Local inhabitants are aware that manatee hunting is prohibited, and several insisted that one "goes straight to jail" if found hunting a manatee. In addition to this reason, hunting has been abandoned to a great extent because of its difficulty: it takes extreme skill to harpoon the animal, which is unfriendly and has a fine sense of hearing, and whose enormous strength may put the hunter at risk. One of the informants summarized this general idea by stating that manatee hunting is not worthwhile because it is much more complicated than hunting land animals (*i.e.* white-lipped peccary (*Tayassu pecari*) or paca (*Agouti paca*)).

The hunting technique used in the zone coincides with that used by the Miskito Indians of northern Nicaragua and is similar to the techniques used in most countries where the species is found.[1] A majority of the expert hunters in the zone were born in Nicaragua and are Miskito, although more hunting possibly took place in Costa Rica. To hunt a manatee, it is first necessary to wait for several days near the site where it leaves traces of its feeding. According to several hunters, the best time to hunt is during the night of a full moon, especially in March and April. The wait typically takes place within a light canoe, and the basic hunting team includes two people: an oarsman/helmsman at the back of the boat and a harpooner at the prow. As the hunters wait or approach the hunting ground, they must row in a special manner so as not to produce any noise in the water that startle the animal. This is so important that one of the best hunters in the region used special oars (locally called *canaletes*) with knife-like edges to minimize disturbance in the water.

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Annex 32

JIMÉNEZ OREAMUNO, RICARDO, *HIS THOUGHTS*, SAN JOSÉ: EDITORIAL COSTA RICA, 1980 (EXTRACTS)

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..."Costa Rica and not Nicaragua could have complained about that delay" and when the forty days expired, he [Mr. Rives] could have declared the negotiations concluded and broken, even though he was not obligated to do so. He thought it was more opportune to extend the period of forty days in favor of Nicaragua and by so doing was fully complying with the law. Having given his approval to Nicaragua, he cannot it retract because Costa Rica did not make use of a right, the exercise of which was exclusive for her. In all due justice, Mr. Rives concludes by declaring this last argument of Nicaragua unsustainable just like the previous ones.

The published part of Mr. Rives's report ends here. It can be be assumed that the wisdom and good judgment that stand out in that part are also equally present in the rest of the report. The just arbitral decision regarding all the other secondary questions discussed makes us infer that. "*Las Novedades*" of New York criticizes the award because it does not give us the right to navigate in the San Juan with vessels of war. The criticism, I would say, is unfounded. The emphasis with which article 6 of the treaty consigns that Nicaragua shall have the *exclusive dominion and sovereignty* [original Spanish: *dominio y sumo imperio*] over the waters of the river manifests a desire to establish a difference between the rights that were agreed that Nicaragua and Costa Rica would have in those waters. Now, if merchant ships and vessels of war of both Republics navigate freely and indistinctly on the river; where is it manifested, what practical effect does the solemn declaration have that the dominion and sovereignty over the waters correspond to Nicaragua? The rest of that article corroborates this meaning. It was considered that that absolute affirmation would take away from Costa Rica all use, all enjoyment of the river, and as that was not the intention, the exception was put immediately thereafter, which stipulated that Costa Rica would have in said waters perpetual rights of free navigation, with "objects of trade". If the exception does not also appear in the article in favor of vessels of war, the inference is logical: it was not thought that Costa Rica had that right. The argument that is gleaned from article 4, regarding the obligation that Costa Rica has to contribute to the defense of the river in case of foreign aggression, was perceived as much less than conclusive. Costa Rica shall contribute to that defense when the foreseen hypothesis occurs. In the meantime, in time of peace, without the most remote risk of hostilities, to pretend that our vessels of war navigate to contribute to a defense that no attack provokes is to get to the subtleness with which the Nicaraguans examined the treaty. Costa Rica, by virtue of article 4, was obligated to

defend the San Juan as an ally of Nicaragua; and, when has it been seen that an ally, by being an ally, pretends to have the right, without there being a war, to transit with troops through the allied territory, navigate its internal waters with vessels of war or station fleets in its ports?

Annex 33

LEÓN SÁENZ, JORGE, *THE EVOLUTION OF FOREIGN TRADE AND MARITIME TRANSPORT OF COSTA RICA: 1821-1900*, SAN JOSÉ: EDITORIAL DE LA UNIVERSIDAD DE COSTA RICA, 1997 (EXTRACTS)

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GENERAL FRAMEWORK

The growth of the Costa Rican economy has depended, historically, on its link with the world market, since its reduced size has not allowed for autonomous development. During the colonial era, Costa Rica was considered one of the poorest Spanish possessions. But soon after its independence from Spain, the country took advantage of the greater opening of world markets in the early nineteenth century to notably increase its foreign trade, resulting in a very significant improvement in the country's economic situation. This improvement enabled Costa Rica to achieve, by the end of the century, development that was relatively superior to that of the rest of Central America.

The objective of this work is to demonstrate the main characteristics of the growth in Costa Rica's foreign trade from 1821 to 1900, as well as to identify the main internal and external factors that enabled the country to insert itself so effectively into the global markets of the day.

The dynamism of foreign trade during the nineteenth century can be explained in terms of the following factors: expanding markets for national products—primarily coffee; fortunate political decisions with respect to export promotion; development of an active business class of producers / merchants / shippers; and changes in transportation technology that made it possible for the country to compete with its products in external markets.

The following chapters provide a description of the origins and development of foreign trade from 1821 to 1900, focusing on each of the factors mentioned above. The limitation of the period follows the fact that the most important changes in trade began to occur as of 1821, with independence from Spain, which allowed for the introduction of free trade policies.

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of these ports, there is much information, probably due to the increase in trade during this time.[1] With respect to the Caribbean ports, we can affirm that contraband prevailed, providing much work to the government officials committed to controlling such activities. For this reason, there are only very partial registries of the marine traffic implemented through these ports.

The final section will deal with the beginnings of the coffee trade. In the first years of the 1830s, a modest exchange of coffee began with Chile, the country toward which incipient trade had been directed as of the mid 1820s. Subsequently, direct exchange with European markets began and, later, with the United States. This trade was the origin of national economic development in the last century and, to this day, continues to have a significant influence on the country's prosperity.

1. FOREIGN TRADE IN THE ERA OF INDEPENDENCE

Tobacco and trade with Central America: In order to obtain an exportable product that would later make it possible to acquire manufactured and other goods that the country required but could not yet produce, during the colonial era efforts were made to cultivate important export products. The first attempts, initiated in the late seventeenth century, focused on cacao from Matina, which effectively constituted — together with tallow, hides, provisions and mules— a source that enabled the country to cover, although poorly, its needs to import goods and products. The importance of cacao was even demonstrated by the fact that its seeds were used as a substitute for silver money, which was in short supply in Costa Rica. However, and in spite of the recognized quality of cacao from Matina, production dropped dramatically toward the end of the eighteenth century, and it became necessary to seek a better alternative. This was the cultivation of tobacco.

Tobacco consumption was on the rise during the colonial era, both within and beyond Central America. At this time, significant quantities of tobacco were produced in Iztepeque (El Salvador) and other areas. However, in 1780 the Spanish government decided to concede a monopoly over production within the Captaincy of Guatemala to Costa Rica, as a means to activate the economy of this province, which was considered to be lagging very far behind. This support served to extend crops to new zones, especially toward the western part of the Central Valley, where San José and Heredia became the main production centers. In addition, the Tobacco Factory was established in the former zone, responsible for regulating the crop and preparing and distributing cured tobacco. The incorporation of more than a thousand farmers in the production of a marketable crop had an important effect on the country's economy. In effect, tobacco became the main export product and, more importantly, the mechanism required to monetize the economy, because the Tobacco Factory paid in silver coin. Even after the monopoly over exportation to the Captaincy was lifted, tobacco remained the principal product exported to Central America, given that the other exports of this era were sent mainly to Panama and the Viceroyalty of Peru.

Tobacco was exported under the strict control of an official monopoly, exercised in Costa Rica by the Factory of San José. This monopoly acted as a strong economic power in Central America; it was the main source of income of the Government of the Captaincy General of Guatemala, as it was in other colonial governments of America. As a monopoly of the kingdom, it established who could cultivate and even planned the number of plants that were to be sown. The declaration of a monopoly over production in Central America in favor of Costa Rica initially made it possible to incorporate close to a thousand producers (from a total population that in 1780 must not have exceeded 50,000) into production of the crop, even though in later years, after the monopoly was lifted, only a few hundred of these producers remained.[2] The producers were strictly controlled in order to prevent tobacco contraband, but documents from the era include much evidence that this illegal trade took place, at least within the country. In any case, tobacco served to generate incomes that increased the trade with Central America and then, in the latter decades of the colonial era, even became a product exported to Panama.

The Factory performed another very important role, facilitating financing for foreign trade with the rest of the Captaincy General. Because the Factory was part of an administrative system that covered the entire kingdom, along with all of the kingdom's factories or branches, it could issue and receive orders of payment in favor or against the others. Traders from one of the states could use this system to make payments or charge for the products sent to another state. There was also the great advantage that the trader did not have to travel physically to make payments, or take long and dangerous trips over poor roads. By means of the Factory, after depositing the corresponding amount the trader obtained an order of payment issued in his name (or that of the other trader who was to receive it). This order could be converted to cash in another factory of the kingdom.[3]

The tobacco trade also encouraged the development of maritime transport. Initially, most of the tobacco, the most important market of which

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The fall of the Spanish Empire, beginning in 1810 in South America, favored the large-scale penetration of British trade and, to a lesser extent, that from the United States. This first occurred in that part of the continent and then progressively extended to Central America. In this way, the need to rely on contraband became much less important for foreign merchants, replaced by legitimate trade as the new republic opened its ports to free trade. Nevertheless, as will be seen below, contraband continued to exist during the republic, due to internal economic conditions that favored it.

2. TRADE EXPANSION IN THE 1820s AND 1830s

Socioeconomic Situation at the Start of the Period of Independence

As mentioned above, the situation of conflict during the wars of independence depressed foreign trade in the country, which began to rebound only in 1825. In Costa Rica's case, although it tried to avoid the fratricidal struggles that occurred in the rest of Central America, the country also had serious internal conflicts that affected national development. The first of these was in 1823, brought about by different positions adopted by the cities and main villas with respect to Mexico's imperial impositions under Iturbide, who sought to annex Central America to that nation, by force if necessary. Fortunately, after a brief internal armed confrontation, the crisis was resolved due to Iturbide's fall and the retreat of the Mexican troops that had occupied Guatemala.

Following this episode was a period of some twelve years of relative stability, allowing the country to reestablish the tobacco trade - its main source of income - had been virtually paralyzed in 1822 and 1823 because political problems in Nicaragua and other states had prevented these countries from paying Costa Rica for the tobacco sent since 1821. At the same time, efforts to diversify production continued; these efforts had been initiated during the colonial period through the promotion of sugarcane and coffee cultivation and the production of salted beef and tallow. Added to these activities was the extraction of brazilwood, gold and silver.

In order to isolate itself from the region's conflicts, Costa Rica had declared partial sovereignty between 1829 and 1831 through application of the so-called Aprilia Law. In the latter year, however, the country again joined the Federal Republic of Central America. The final years of the period that we are studying were more turbulent for the country. A new internal armed conflict occurred in 1835 with the annulment of the law that mandated the rotation of the National

capital between the four main cities. This deed gave rise to the brief War of the League, which confirmed San José's status as the national capital.

As of 1835, with Braulio Carrillo as Head of State, important economic reforms were introduced, that resulted in increased dynamism of the economy. Among the most important contributions in this field were the issuance of the Law of Bases and Guarantees and the codification of laws, which until then had been based on colonial laws. In the economic arena, the Regulations of the Public Treasury were issued, and the tobacco and liquor monopolies (the main pillars of the public treasury) were reformed. In addition, through an agreement with the English Government, Carrillo was able to cancel Costa Rica's portion of the Central American foreign debt, significantly reducing the problem of claims regarding arrears in debt payment, which continued affecting the other states.[16] In order to stimulate trade, the first Code of Commerce and the new Customs Duty, approved in 1839, were both of great importance.[17]

The period of the two decades after independence closed with a new armed conflict. This arose with Costa Rica's separation from the Federal Republic and the Francisco Morazán's subsequent invasion leading the Central American Federalists, who, in April 1842, defeated Carrillo. The attempt to revive the Federal Republic was short-lived: in

September of the same year, Morazán was defeated and executed by firing squad in San José.

By the end of the period, the national economy had changed substantially with respect to the situation twenty years prior, at the dawn of independence. The country had diversified its production. In addition to tobacco - which continued to be an important export product and the state's main source of income - other activities had been developed, such as the exploitation of gold and silver and of logwood (although the importance of both had decreased greatly by the early 1840s). Other products of a certain relevance included loaf sugar (*chancaca*) and, to a lesser extent, hides. In any case, by 1839, coffee had already become the most important export product, even though its production had been negligible at the time of independence. By 1843, coffee represented more than 80% of the value of all exports from the country.

The predominant role of coffee had been established by 1843 and would continue for another century and a half. Its consolidation was not yet certain, however, since the possibilities for the grain's large-scale commercialization directly to Europe had still to be confirmed. Fears that the rise of coffee would not be permanent were not unfounded, given that other products of the period, such as metals and

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[...] transported those passengers in a hurry to reach their destinations. For slightly more than ten years, until 1858, this route was important.

The Sarapiquí route came about with the opening of inter-oceanic communication via Nicaragua, using the San Juan River and Lake Nicaragua to transport mainly passengers and mail from the east coast of the United States to California, and vice versa. In the Caribbean, the route's terminus was the port of San Juan del Norte, a site at which ships began to arrive regularly as of 1848. The arrival of the Royal West Indies Mail steamers at this port in this year, and subsequently of US steamship lines offering services from New York and New Orleans, made the route to San Juan via the Sarapiquí River attractive to Costa Ricans.[3] It is important to note that this route had been promoted since the 1830s, when the government took steps to ensure the arrival of the Royal Mail steams to San Juan.

The river portion of the trip involved boarding small barges or canoes that were rowed up the San Juan River to the mouth of the Sarapiquí, continuing up this river to the site of El Muelle, where passengers and cargo would disembark and a customs office had been installed. This up-river journey took from three to six days, depending on weather. But the trip down river took only between fifteen and twenty-four hours.[4]

The overland section of the route was considered very difficult and also dangerous.[5] For this reason, it was used primarily to carry mail and passengers from Costa Rica and only in a secondary manner to transport urgent or high-value cargo. Even during the route's high period, between 1848 and 1856, the transport of merchandise was limited. After 1856, with the arrival of the steamer line to Puntarenas, such transport practically disappeared, to such an extent that the Sarapiquí customs office was closed definitively in 1859.[6]

Some years later when Nicaragua revived the Transit Route (the effects of the war with the pirates having passed), Costa Rica again became interested in reactivating the route. However, this was soon forgotten due to the decision to build a direct railroad to a port on the Caribbean.[7]

The Beginnings of Maritime Movement via Limón: 1867-1882

The long time required for transport via the Pacific and the high costs involved in the alternative route of steamers and the Panama railroad were of continuous concern to the government. The construction of a railroad to the Atlantic was seen as the best solution for the transport problems affecting foreign trade. In 1861, the state sent an expedition to travel the seaboard and recommend the site for a port. The ideal site was located at

the Bay of Limón, a few kilometers south of the old anchorage of Moín. A contract was immediately signed with a Belgian entrepreneur, E. Ponguin, to open a road to the site of the future port.[8]

This first attempt to open the road was unsuccessful, so the state assumed the task on its own. In November 1863, efforts began toward the design and, subsequently, the construction of works,[9] which continued until 1869 when a path had been completed that, although allowing for passage, was insufficient for the transport of export or import merchandise. In any case, overland communication was established, and in 1867 a decree was issued declaring the port of Limón open.

While the road was being built, the government continued actively to promote the construction of a railroad to that port. Between 1864 and 1865, the German engineer F. Kurtze, Director General of Public Works, carried out studies for the placement of the railway, and his results were disseminated abroad to seek financial support.[10] In 1866, the first contract was signed for railroad construction, but this contract, and a second one signed in 1869, were not completed.[11] Finally, in 1871 a third contract was signed, this time with Henry Meiggs, a US railroad builder who had completed several such projects in the Andes. This same year, Meiggs delegated the contract to his cousin, Henry C. Keith who, in turn, passed the contract to brother Minor C. Keith in 1876, who effectively completed the work.

Construction of the railway to Limón began in late 1871. It took nineteen years to complete, for it was not until 1890 when the first train could pass from Limón to San José and thus end this enormous task toward which the country had dedicated so much effort. First financial and then technical problems were the main reason for the delay in the railroad's completion. An intermediate solution that functioned with some efficiency was to take the railroad to the Sucio River ("the old line"), where it met the highway at Carrillo, which connected with San José. In this way, by combining the railroad and highways, overland communication with the Caribbean was possible since 1882. From 1882 to 1890, the Carrillo road remained in operation, carrying an increasingly greater proportion of the country's foreign trade. In this way, the true growth of Limón as a port began.[12]

Before the route could be opened for foreign trade, Limón's importance as a port was limited to serving as a point of entry for construction materials, workers, food and other consumer goods required by the railroad. As of its opening in 1867, the shipping traffic it received increased rapidly, and by 1873 the arrival of more than 90 ships was recorded. As mentioned above, cargo was almost exclusively for importation

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Table 6-2 illustrates the speed with which Limón overtook Puntarenas as the primary port of the Republic. From receiving only 7% of all trade in 1878-79, in slightly over four years —with the opening of the Carrillo highway and the railroad to the Sucio River— Limón began to handle 32% of all exports and 65% of imports! The main reason for exporters' hesitation to use Limón was probably that the shipment of coffee over highways and its transfer to train at the Sucio River were considered risky due to the possibility that the product would get wet and be ruined. In 1886, some exporters still continued to use the port at Puntarenas but, by then, most had been convinced to use the railroad as their means of transportation.

Twenty years later, Limón's dominance over Puntarenas was absolute. More than 90% of foreign trade entered or left via the Caribbean, an exact inverse of the situation in 1878-79.

TABLE 6-2

DISTRIBUTION OF TRADE BY PORT

Year	Importation		Exportation	
	Puntarenas	Limón	Puntarenas	Limón
1878-79	N/A	N/A	93%	7%
1883	35%	65%	68%	32%
1886	25%	75%	43%	57%
1907	13%	87%	6%	94%

SOURCES: National Statistics Office, 1879 Report; Statistical Summaries 1883-1893; and 1907 Report.

Annex 34

MCNEIL, JEAN, *THE ROUGH GUIDE TO COSTA RICA*, FOURTH EDITION (APRIL 2005), NEW YORK: ROUGH GUIDES, 2005 (EXTRACTS)

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(...)

The Río San Juan and the Nicaraguan Border

Heading to or from Barra from the Sarapiqui area in the Zona Norte entails a trip along the Rio Sarapiqui to the mighty **Rio San Juan.** Flowing from Lago de Nicaragua to the Caribbean, the San Juan marks most of Costa Rica's border with Nicaragua, and the entire northern edge of the Barra del Colorado Wildlife Refuge. Though it's theoretically in Nicaraguan territory (the actual border is the bank on the Costa Rican side, not the midpoint of the river), Costa Ricans have the right to travel on the river. There isn't however, an Official entry point between the two countries so it's technically illegal to cross into either country along this stretch. For more details on crossing into Nicaragua see p.199.

One bizarre phenomenon local to this area is the migration of **bull sharks** from the saltwater Caribbean up the Rio San Juan to the freshwater Lago de Nicaragua. They are unique in the world in making the transition, apparently without trauma, from being saltwater to freshwater sharks.

You'll notice much evidence of **logging** in the area especially at the point where the Sarapiqui flows into the Rio San Juan the lumber industry has long had carte blanche in this area due to the non-enforcement of existing anti-logging laws. The **Nicaraguan side** of the Rio San Juan, part of the country's huge Indio Maiz Reserve, looks altogether wilder than its southern neighbour, with thick primary rainforest creeping right to the edge of the bank. Partly because of logging, and the residual destruction of its banks, the Rio San. Juan is silting up, and even shallow-bottomed *lanchas* get stuck in this once consistently deep river. It's a far cry from the 1600s and 1700s, when pirate ships used to sail all the way along the Rio. San Juan to Lago de Nicaragua, from where they could wreak havoc on the Spanish Crown's ports and shipping.

Annex 35

MOLINA, FELIPE, *REPORT ON THE BORDER QUESTIONS RAISED BETWEEN THE REPUBLIC OF COSTA RICA AND THE STATE OF NICARAGUA*, MADRID: IMPRENTA DE LA VIUDA DE CALERO, 1850 (EXTRACTS). ENGLISH TRANSLATION

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or at the mouth of the river, or at any other point along its course.

In such circumstances, it so occurred that the inhabitants of Costa Rica, having discovered since 1821 the possibility of opening communications to the port, by means of the Sarapiquí River, a tributary of the San Juan, undertook to build, and indeed did build, a road toward said course, and they began to direct their trade to that side, under the same terms as permitted the Nicaraguans. Use of the port was common to all. Therefore, while the federal union lasted, no border question was stirred up, nor was there any urgency to promote one.

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the army recovered the full right to natural liberty, and as of then could become incorporated definitively to Costa Rica. This state also had the full right to declare it an integral part of its territory.

Nevertheless, Costa Rica waited, proceeding under these circumstances with great circumspection and prudence. As everyone knows, the people of Costa Rica are hard-working and peaceful. Dedicated to farming and trade, they live from the exportation of their fruits. The center of [the country's] power is found limited within a comparatively small space: situated in the high valleys of the mountains, in the middle of her vast territory. From this it follows that war, even a simple blockade, would cause the country imponderable prejudice, even if the luck of arms were favorable to her. Thus her consideration to avoid any rupture with her neighbors, not because war frightens her or because she fears its outcome, but rather to prevent its consequences and economize sacrifices. Costa Ricans think, with reason, that men must not use life to sustain bloody struggles but rather to procure well-being through work.

Among many good and brilliant qualities, the inhabitants of Nicaragua unfortunately offer the opposite of this description. Generally indolent, accustomed to living in perpetual conflicts among themselves and with bordering States, spread out over an extensive land area:

shepherds rather than farmers, and using cattle as their means of subsistence; it is clear that for them, a long war would be

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less disastrous than for other peoples found in a different situation.

The nature of the Costa Ricans, as well as their position, explains the behavior they have maintained until now in this affair: their reserve, their long patience before openly proclaiming the titles that support them: their willingness to make sacrifice of their own rights; and the conciliatory formulas that they have employed constantly to maintain good harmony with Nicaraguans. But this laudable moderation may wrongly be interpreted as a surrender. Certainly not; there has been no tacit renunciation on her part to legitimate pretensions, nor a lack of confidence in an ambiguous right. In addition, as long as the hope of renewing the federal ties subsisted, Costa Rica could, with all sincerity and without abandoning any of its rights, declare in Article 1 of her Constitution of 1843 "that the borders of the state on the side of Nicaragua would be definitively fixed when the National Representation, having been reinstalled, would hear Costa Rica." In that era, Costa Rica could still, without incurring any sign of duplicity and so as not to provoke the unruly temper of the Nicaraguans, allege that she retains the possession of Guanacaste as a result of it being a deposit confided to her by the National Congress, of which she must not have parted without the consent of the depositor.

After the fall of the federal authorities, the government of the State of Nicaragua, being that which had the port of San Juan most within her reach, seized said customs office,

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and arbitrarily imposed much increased duties over merchandise transported through there to Costa Rica, regarding which, this State, then, did not lodge any complaint, both as an effect of her habitual moderation, and because she conserved the hope that the union would be reestablished; and above all because, with her most important trade having taken a direction toward the Pacific Ocean, little did she feel the gravity of such an advance.

During the period of which we are here concerned, three ambassadorships crossed from one country to the other with the purpose of terminating their differences: that of Mr. Oreamuno, sent from Costa Rica to León; that of Mr. Tijerino, sent from Nicaragua to San José; and finally that of Messrs. Madriz and Escalante, sent from Costa Rica to Nicaragua.

We will address each of these ambassadorships separately. The first took place precisely at the moment when the Federation expired (1838) and when Nicaragua was carrying out the revision of her particular Constitution. Nicaragua then spoke of employing the Salto River as a border on the side of Costa Rica. Mr. Oreamuno stepped in, requesting that the perpetual aggregation of Guanacaste be recognized and declaring that his country was determined to defend the borders of the San Juan River, of the great lake and of La Flor River. The government of Nicaragua could not pretend not to know about said claim, and took the stance of leaving this affair in suspense. Her new Constitution warned "that the limits of the country shall be designated by a

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in making concessions to Costa Rica that were too advantageous. Under the pressure of opinion, already forewarned, in this manner, they could not work with freedom on an agreement that, without doubt, they desired. They were forced to adhere literally to the instructions that had been imparted to them. Consequently, it was impossible to agree upon a fair transaction.

Nevertheless, after many months of conferences, the representatives of each of the countries, equally hoping to dispel the probabilities of a rupture, resolved to sign on December 12, 1846, three different treaties: forged more to give some respite to the disagreements than with any hope of their being ratified.

The first of these treaties established an offensive and defensive alliance between the two States, a project that could never have pleased the Costa Ricans because it would have committed them to taking part in the frequent wars of Nicaragua with her neighboring States.

The second was related to navigation of the San Juan. This stipulated that the Costa Ricans were to pay, at the port of San Juan, warehouse fees, a tax over the tonnage of ships, and a transit duty of two silver *reales* (or five *reales* made of a copper and silver allow) for every "quintal" of fruits exported, along with four percent of the value of the merchandise imported. The same treaty also contained various dispositions related to the San Alfonso estate situated on the Sarapiquí, with the intention of placing it under common inspection

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Such treaties must naturally have been ratified within an instant in Nicaragua, whereas in Costa Rica they were received with the indignation they deserved. The Costa Ricans could not accept any arrangement by means of which they themselves would be allowing their least ambiguous rights to be put into doubt.

They could not commit themselves a priori, and before the arbitral trial, to the abandonment of possessions which they have enjoyed at all times, such as the exclusive ownership of the Sarapiquí and the border of the San Juan. With respect to Guanacaste, which is for them a recent acquisition, they would accept arbitration in good faith. They accepted it even with respect to all of the other questions, in any nature that it would take, as long as no prejudicial renunciations were included in the act of commitment.

It must therefore be of no surprise that the legislature of Costa Rica refused to sanction those treaties, or that the cabinet of San José, instead of proceeding with useless negotiations, kept silent for such a long time.

However, the government of Costa Rica always

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took pains to conserve the greatest harmony with that of Nicaragua. With this aim, the cabinet of San José addressed that of León in May of 1848, stating: "that an attempt was being made to open a new road in the direction of the Sarapiquí, and that it counted always on the friendly disposition of Nicaragua to celebrate a trade agreement, after Nicaragua had recovered the port of San Juan, occupied at that time by the British."

To this announcement full of courtesy and deference, the cabinet of León responded with the threat of a rupture in the event that work on the road was not suspended, until the borders could be definitively arranged.

Transit by the San Juan had become a vital need for the Costa Ricans, so the uncivil opposition intimated by Nicaragua was the same as condemning [Costa Rica] to a certain decline in her trade and wealth.

No one, then, should be surprised that the Costa Ricans, in their desperation, have conceived of the idea of requesting the mediation of some foreign power. Nicaragua with less reason than any other, since that state was the first to give such an example when, in 1839 to 1840, she invoked British intervention in her conflicts with the federal power.

When, in spite of the identity of origin, of race, of religion, of language and of institutions; when in spite of so many considerations that should tightly unite the two peoples, the Nicaraguans have thought they can take advantage of their superior

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With respect to Guanacaste, it was proposed that a consultation again be held regarding the will of those inhabitants, whose votes would be explored and collected on site by a mixed commission composed of representatives from both countries.

Such propositions were certainly more than fair, for they abounded in generosity. Nevertheless, they were discarded. Costa Rica was given this hard alternative: either renounce Guanacaste or renounce the Sarapiquí and the San Juan. These conditions are equally inadmissible because, on the one hand, in Guanacaste Costa Rica possesses a significant population, extensive farms and a growing number of cattle; whereas on the other hand, the mentioned rivers are the two main arteries for the country's circulation to the Atlantic.

Not having been able to agree upon any treaty of this nature, Mr. Molina proceeded to propose different plans for the signing of a provisional arrangement, supported by a treaty of friendship and trade, the spirit of which was meant to maintain the status quo until a definitive solution could be reached by the means of reason. To this effect, it was stipulated that the parties must deal with each other in a friendly manner, or subject themselves to the decision of arbiters to be selected within no more than ten years. It was also proposed that the question be submitted immediately to the government of Guatemala, before which both parties would be obliged to appear and defend their cases within a term of two years. In the meantime, the products of each country would enjoy in the other country a full exemption that, although reciprocal in appearance,

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Annex 36

MOLINA, FELIPE, *STUDY OF THE REPUBLIC OF COSTA RICA*, NEW YORK: S. W. BENEDICT PRINTERS, 1851 (EXTRACTS)

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§ 14. PRODUCTION

All products of inter-tropical regions are found in the country, and of excellent quality. However, certain products such as cochineal, cotton and vineyards cannot be cultivated for profit because of the excessive rains that destroy harvests when maturity is near. Coffee, which is currently the primary export item, has been qualified as excellent, although it rarely reaches the marketplaces of Europe without having suffered deterioration due to the delays and setbacks experienced by shipments in the long and difficult trip that must be made around Cape Horn.

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§ 15. TRADE

This is carried out mainly with England, on English ships. Almost all products from the country end up in the

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EXPORTATION

(...)

United Kingdom, in exchange for English manufactured goods, which to date make up the greatest part of consumption. Nevertheless, there is a French firm that receives three or four expeditions each year, and the French goods are highly esteemed. The growth of trade is paralyzed by the need to follow the long and laborious path of Cape Horn, as the several articles that it would be convenient to export cannot support the increased charter fees or the heavy costs of such lengthy navigation. From 1848 to 1849, the entry of ships to the Port of Punta Arenas increased in number to 70, with a total of 7,188 tons of imports. If we add a similar amount in exports and 1,200 tons for all trade from Matina, we would have the sum of 15,571 tons, representing mercantile movement as a whole. Instead of having decreased, it seems that trade has been greater during the year from 1849 to 1850, with new traffic having opened with California, which is a fifteen to twenty days sail from Punta Arenas.

From the announcements in the newspapers, we may conclude that the number of ships that visited Punta Arenas from 1850 to 1851 will be no lower than 150, and another 50 ships, although small in size, have been in Matina. Therefore, the traffic entering and leaving will probably have increased to twenty thousand tons.

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ROUTES OF COMMUNICATION

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In the Pacific, the Republic of Costa Rica possesses many safe and spacious ports, such as: Golfo Dulce, Puerto Inglés, Las Mantas, Caldera, Punta Arenas, La Culebra, Santa Elena and Las Salinas. Among them, only Punta Arenas is currently frequented and has been outfitted for foreign trade, with the Free Port privileges granted by the legislature for the term of three years, from September 1847 to September 1850, which has subsequently been extended. There, one need not pay any duties, neither for importation, exportation or deposit, nor for the loading or unloading of merchandise. In a word, mercantile operations are not subject to any restriction or formality. The only exceptions are articles blocked by the Government, such as: liquors or distilled alcohol, tobacco and gunpowder, which by order must be deposited in public warehouses and cannot be imported or exported without special license. Rifles and other arms or military supplies are subject to the same rules. Tonnage duties are not charged to ships, which need not carry out any expenditures when entering or leaving except for piloting fees when they wish to be anchored within the estuary (six *reales* for each foot of hold) and three pesos for permission to set sail.

On the Atlantic side, there is not a single site along the entire coast from San Juan, toward the southeast, to the

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cove of Veragua, that merits being called a good port, except for the magnificent bay of Boca Toro. Neither Matina nor Salt Creek (Moin) offer the necessary requisites, and this part of the seaboard is currently rarely frequented. Only a small amount of trade in sarsaparilla, tortoiseshell, coconut oil, etc. etc. is carried out from there. (See the descriptive chapters on Punta Arenas, Golfo Dulce, Boca Toro, Matina and San Juan.)

The franchises granted to Punta Arenas have provided such advantageous results that they are likely to be perpetuated.

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SAN JUAN OR GREYTOWN

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The settlement of this question of dominion between the three parties that claim it remains pending and is the subject of diplomatic negotiations.

Meanwhile, the port has been declared free, pursuant to the Clayton-Bulwer Treaty. There is no doubt that San Juan is destined to be a market of the first order, as well as the main point of departure for trade from Costa Rica by means of the Atlantic.

The port offers excellent anchorage and by day is very crowded with American and other ships with passengers going to, or coming from, California.

British steamers of the Royal Mail travel directly from Southampton to San Juan in 26 days, twice per month, and the American Vanderbilt line dispatches other ships from New York, making the trip in eight days.

These advantages are responsible for the increase in population over the past three years, growth that is likely to increase more quickly with every day.

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Annex 37

MOLINA, FELIPE, *MEMOIR ON THE BOUNDARY QUESTION PENDING BETWEEN THE REPUBLIC OF COSTA RICA AND THE STATE OF NICARAGUA*, WASHINGTON: GIDEON & CO., 1851 (EXTRACTS)

(...)

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COLONIAL PERIOD. 1502-1821.

The territories now known under the names of Costa Rica and Nicaragua, formerly inhabited by various small tribes of aborigines, were discovered and settled by different Spanish adventurers. In the course of time, the cabinet of Madrid thought proper to form one single province, by uniting the two, under the authority of an officer called the Intendant, (Intendente.) That functionary, like those of equal grade existing in Honduras, San Salvador, and Chiapas, was subordinate to the captain general of the so-called kingdom of Guatemala, who resided in the city of the same name. The amalgamation, nevertheless, of Costa Rica and Nicaragua was never complete, and the former province always maintained its own particular governor, independent of the Intendant, residing in Leon, in every thing relative to questions of *war and* the administration of *justice,* and was only subject to his authority in *financial* affairs. The intervening district, formerly called *Xicoya,* and now ***Guanacaste,*** from its chief towns being so named, was sometimes placed under the immediate jurisdiction of the authorities at Leon, and at other times under that of Cartago, the capital of Costa Rica. The traffic of those countries by the Atlantic ocean was at that period very insignificant, either through fear of the pirates or buccaneers, who infested the coast, or owing to the system of monopoly and sequestration observed by Spain. The San Juan, that magnificent river, was very little frequented. Military garrisons had only existed at San Carlos, where the river issues from the lake, and where a fort was constructed, as well as in the place now called Castillo Viejo, on account of a ruined fortress near that spot. It was not until the close of the last century, (1796,) that a detachment of troops was placed at the mouth of the San Juan. Such a garrison was naturally placed under the immediate control of the highest authority of the province, who ruled jointly over Costa Rica and Nicaragua, and who resided at Leon. All the aforesaid posts were often garrisoned with Costa Rican soldiers. No road existed then leading from the table lands of Costa Rica to the mouth of the river, while the intercourse between the towns of Nicaragua and the said port offered no difficulties, it being but necessary to traverse the lake and descend the river in boats. At certain periods of comparative prosperity for Costa Rica, the port of Matina, on the Atlantic, had satisfied the necessities of commerce; but frequent descents of pirates had caused that port to be neglected.

It was about that time that the Spanish Government issued a royal decree, dated Aranjuez, the 26th of February, 1796, to the following effect: "His Majesty, being desirous that the province of Nicaragua and the other provinces of the kingdom of Guatemala, which are situated more than

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three hundred leagues distance from the capital, and from the ports of Omoa and Santo Tomas de Castilla, may be enabled to carry on a direct trade with the mother country, without being subject to the inconveniences of a long distance, has been pleased to declare that the harbor of San Juan de Nicaragua, on the river of the same name, shall be a port of the second class; and it is further provided, that, for the present, such a privilege shall be considered as extending to the city of Granada, on the Lake of Nicaragua, up to which lake said river is navigable; and consequently all the immunities and exemptions, to which San Juan is entitled, shall for the present be also enjoyed by the city of Granada." (a)

The perusal of this decree is sufficient to establish, beyond all question, the right of Costa Rica to the port of San Juan. The object of the privilege granted to San Juan was to benefit the province of Nicaragua, and other provinces, distant upwards of three hundred leagues from the capital. In whatever light we may consider this point, it will appear that Costa Rica was entitled to the privilege, both as a member of the Intendancy of Nicaragua, and by its ranking among the provinces distant more than three hundred leagues from the capital. Any one casting a glance over the map, will acknowledge at once that no country could more largely profit by the opening of the new port than Costa Rica. The extension of the grant to the city of Granada was but a common effect of the Spanish system of erecting interior custom-houses, or " dry ports." However, there is hardly any ground for the inference that it was intended by the royal decree to forbid the other provinces, alluded to in the same decree, from carrying on a commercial intercourse with Spain by any other route than that of Granada.

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Annex 38

RODRIGUEZ BOLAÑOS, JOSE ALBERTO AND BORGE CARVAJAL, VICTOR GUILLERMO, *THE RAILROAD TO THE ATLANTIC IN COSTA RICA*, SAN JOSÉ: UNIVERSITY OF COSTA RICA, 1979 (EXTRACTS)

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The famous railroad builder Henry Meiggs was then working on the railroads of Peru, so his nephews Henry M. Keith and Minor C. Keith took charge of the work.

In order to finance the project, loans were taken with European firms for amounts and under conditions that became extremely onerous for the country.

The construction of the railroad began in 1871, in Alajuela and Limón simultaneously. The plan was to finish the railroad in 1874. By this date, however, it had advanced only from Alajuela to Cartago and from Limón to Matina (less than one third of the route). (See Map 2)

Without funds and embroiled in serious financial problems with its European creditors, the government took charge of the effort in this year. Work progressed very slowly, and only in 1882 was a mixed route to the Atlantic put into use: a road from San José to a point called Carrillo, and a railway from Carrillo to Limón.

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analyzed in chapters IV and V, did not allow the opening of the Atlantic route, which would cut the distances between Costa Rica and the main European and American trade centers. Thus, it is not surprising that, during the first and second phases of the opening of the railway to the Atlantic, foreign trade from Costa Rica would be limited to Puntarenas, and that the groups of import and export merchants (noting the three social strata mentioned above) benefited more from the route to the Pacific than that to the Atlantic. Even when use of the route from the central region to Carrillo by highway and from Carrillo to Limón by train began, in the early 1880s, the port of Puntarenas lost its monopoly, but not necessarily its hegemony as a port of access to the exterior, mainly toward England and North America. With the formation of the three social sectors of importance in agro-industry and trade, and the formation at its core of a foreign group associated to national groups in the development of trade, by mid century a large group of importing merchants, consignees and representatives of foreign companies had formed and grew stronger over the years. The list reproduced below, which Vega Carballo qualifies as "necessarily incomplete," will serve as a reference point of the groups that intervened and benefited from the development of the railroad, both at the start and during project development.

Annex 39

UNESCO MAN AND THE BIOSPHERE PROGRAMME CERTIFICATE FOR THE SAN JUAN RIVER BIOSPHERE RESERVE OF NICARAGUA, 15 SEPTEMBER 2003

[UNESCO LOGO]

Programme on Man and the Biosphere

By decision of the International Co-ordinating Council of the Programme on Man and the Biosphere (MAB), it is hereby certified that

The San Juan River – Nicaragua Biosphere Reserve

forms an integral part of the World Network of Biosphere Reserves

The principal types of ecosystems and landcapes of our planet are represented in this Netowkr, which is consecrated to the conservation of biological diversity, scientific research and permanent observation, as well as to the definition of sustainable development models at the service of mankind.

Participating in the World Network facilitates cooperation and exchanges at the regional and international levels

Date of Registration General	UNESCO Director
15.IX.2003	/s/ Illegible

Annex 40

MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES, *SAN JUAN RIVER WILDLIFE REFUGE MANAGEMENT PLAN*, MANAGUA: ARAUCARIA-MARENA-AECI, 2005 (EXTRACTS)

SAN JUAN RIVER BIOSPHERE RESERVE REFUGE

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3.3 VALUATION OF BIOLOGICAL DIVERSITY

Natural resources in the San Juan River Wildlife Refuge are still maintained in an excellent state of conservation, although several natural spaces are undergoing a process of regeneration from past human interventions. Nonetheless, the conservation of its great natural wealth will depend on the treatment to which it is submitted in the future. Its main value lies precisely in the condition of its wildlife, which is valued in two categories: diversity of existing natural resources and diversity of ecosystems and species.

a) Species Diversity

Species diversity is very broad in this Refuge. Preliminary evaluation visits have registered 303 Bird species (24 migratory), 26 mammal, 15 reptile, 3 amphibian and 61 insect species. In addition, 7 marine crustacean species, 2 freshwater crustacean species, 13 marine fish species and 10 freshwater fish species are known. However, the San Juan River Wildlife Refuge has already reported important discoveries, despite the few materials that have been collected in such a short period of time, which lead us to think of the immense biodiversity wealth that remains to be discovered once systematic inventories are made and scientific activities intensify.

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Aesthetic value

Another group of species of great value in this Refuge, particularly for tourism, are aquatic birds of attractive contrasting colors, which can be easily seen from traveling boats. There is a predominance of 10 heron species, 2 stork species, 9 dotterel species and 3 fishing marlin species. Darters (*Anhinga anhinga*) and cormorants (*Phalacrocórax olivaceus*) are also very visible. None of these two species are actually ducks, but they both dive very well to feed on fish and invertebrates. It is also possible to see fishing marlins (*Ceryie spp.*), Montezuma oropendolas (*Psarocolius*

***montezuma*), scarlet macaws and great green macaws (*Ara macao* and *Ara ambigua*), among other species.**

…

Species in extinction

The mere presence of extinct species in other parts of the world justifies the protection of many wildlife refuges in the world. There is an international convention, ratified by Nicaragua in 1977 (Official Journal La Gaceta No. 183), whereby we commit to pay attention to the species identified in the CITES Annexes (Convention on International Trade in Endangered Species of Flora and Fauna) in order to control international trade thereof. In this Wildlife Refuge, there are 46 of these species in relative abundance, which places additional value on the intelligent management of the natural resources in this part of the country. A list of these species is found at the end of this document (Annex 2).

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The San Juan River Wildlife Refuge is a natural terrestrial and aquatic habit of fauna species and ecological communities. It is also a stopover for a large number of migratory birds of national and international importance. Within these fauna species, there are rare species, such as the jaguar (*Panthera onca*), manatee (*Trichechus manatus*), crocodile (*Crocodylus acutus*), great green macaw (*Ara ambigua*), tapir (*Tapirus bairdii*), harpy eagle (*Harpie harpija*), and several endangered species, such as the peccary (*Tayassu pecari*, *Pecari tajacu*), deer (*Odocoileus virgineanus*), caiman (*Caiman crocodiles*), iguana (*Iguana iguana*), green and black poison-dart frog (*Dendrobates auratus*) and bull shark (*Carcharinus leucas*). It is worthy to note that it is highly probable that endemic flora and fauna species are found in the area, as well as microorganisms. However, they are not used as an argument because in-depth studies have not been developed with respect to the region's rich biological diversity.

In addition to the foregoing, which fits perfectly with the definition of Wildlife Refuge, the area meets all the criteria described in the regulations on the designation of this category, namely: protection of nature and survival of aquatic fauna species, such as the manatee (*Trichechus manatus*), tropical gar (*Atractosteus tropicus*), bull shark (*Carcharinus leucas*) and tarpon (*Tarpon atlanticus*), as well as terrestrial fauna, such as

tigers (*Felis spp.*), Central American agoutis (*Dasyprocta punctata*), pacas (*Agouti paca*), among others, which are classified as rare, protected or in danger of extinction in the IUCN Red List. Further, it is a breeding ground for lobster (*Panulirus argus*), shrimp (*Penaeus spp.*), green sea turtle (*Chelonia mydas*), hawksbill turtle (*Eretmochelys imbricata*), great green parrot (*Ara ambigua*). There are feeding areas for species of great importance in the local, national and international economy, such as the manatee (*Trichechus Manatus*), peccary (*Tayassu pecari* and *Pecari tajacu*), lobster (*Panulirus argus*), shrimp (*Pendeus spp.*) and tropical gar (*Atractosteus tropicus*), among others, and critical habitats, such as mangroves, peat swamps, flooded forests, palm bogs, lagoons, estuaries, flooded plains, gallery forests and primary forests, among others.

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ANNEX 1. PRELIMINARY LIST OF WILD SPECIES OF FAUNA IN THE SAN JUAN RIVER WILDLIFE REFUGE

INSECTS		
FAMILY	**SPECIES**	**REPORTED BY**
BRENTIDAE	*Brentus anchorago*	Giuliano Trezzi
CERAMBYCIDAE	*Acrocinus longimanus*	Giuliano Trezzi
COCCINELLIDAE	*Epilachna sp.*	Giuliano Trezzi
COENAGRIONIDAE	*Argia pulla*	Giuliano Trezzi
COENAGRIONIDAE	*Argia sp.*	Giuliano Trezzi
FORMICIDAE	*Atta sp.*	Giuliano Trezzi
FORMICIDAE	*Paraponera clavata*	Giuliano Trezzi
FORMICIDAE	*Camponotus sp.*	Giuliano Trezzi
GOMPHIDAE	*Aphylla angustifolia*	Giuliano Trezzi
LIBELLULIDAE	*Micrathyria aequaliss*	Giuliano Trezzi
LIBELLULIDAE	*Micrathyria didyma*	Giuliano Trezzi
LIBELLULIDAE	*Erythemis peruviana*	Giuliano Trezzi
LIBELLULIDAE	*Erythrodiplax connata*	Giuliano Trezzi
LIBELLULIDAE	*Erythrodiplax ochracea*	Giuliano Trezzi
LIBELLULIDAE	*Dythemis velox*	Giuliano Trezzi
LIBELLULIDAE	*Idiataphe cubensis*	Giuliano Trezzi
NYMPHALIDAE	*Caligo atreus*	Javier Baltodano
NYMPHALIDAE	*Archaeoprepona demophoon*	Javier Baltodano
NYMPHALIDAE	*Eueides lybia*	Javier Baltodano
NYMPHALIDAE	*Dryas iulia*	Javier Baltodano
NYMPHALIDAE	*Heliconius charitonius*	Javier Baltodano

NYMPHALIDAE	*Heliconius cydno*	Javier Baltodano
NYMPHALIDAE	*Heliconius erato*	Javier Baltodano
NYMPHALIDAE	*Heliconius melponeme*	Javier Baltodano
NYMPHALIDAE	*Heliconius sara*	Javier Baltodano
NYMPHALIDAE	*Philaetria dido*	Javier Baltodano
NYMPHALIDAE	*Aeria eurimedia*	Javier Baltodano
NYMPHALIDAE	*Mechanitis lysimnia*	Javier Baltodano
NYMPHALIDAE	*Mechanitis polymnia*	Javier Baltodano
NYMPHALIDAE	*Caligo illioneus*	Giuliano Trezzi
NYMPHALIDAE	*Antirrhea miltiades*	Javier Baltodano
NYMPHALIDAE	*Morpho cypris*	Javier Baltodano
NYMPHALIDAE	*Morpho peleides*	Javier Baltodano
NYMPHALIDAE	*Anartia jatrophae*	Giuliano Trezzi
NYMPHALIDAE	*Anartia fatima*	Javier Baltodano
NYMPHALIDAE	*Adelpha cytherea*	Javier Baltodano
NYMPHALIDAE	*Callicore lyca*	Javier Baltodano
NYMPHALIDAE	*Historis acheronta*	Javier Baltodano
NYMPHALIDAE	*Historis odius*	Javier Baltodano
NYMPHALIDAE	*Tigridia acesta*	Javier Baltodano
NYMPHALIDAE	*Cissia confusa*	Javier Baltodano
NYMPHALIDAE	*Dulcedo polita*	Javier Baltodano
NYMPHALIDAE	*Pierella helvetia*	Javier Baltodano
PAPILIONIDAE	*Parides eurimedes*	Javier Baltodano
PAPILIONIDAE	*Parides erithalion*	Javier Baltodano
PASSALIDAE	*Passalus punctiger*	Giuliano Trezzi
PIERIDAE	*Anteos clorinde*	Javier Baltodano
PIERIDAE	*Eurema nise*	Giuliano Trezzi
PIERIDAE	*Dismorphia Zathoe*	Giuliano Trezzi
PIERIDAE	*Aphrissa atatira*	Giuliano Trezzi
PIERIDAE	*Phoebis argante*	Javier Baltodano
RIODINIDAE	*Eurybia lamia*	Javier Baltodano
SATURNIIDAE	*Eacle imperialis*	Giuliano Trezzi
SCARABAEIDAE	*Strategus aloeus*	Giuliano Trezzi
SCARABAEIDAE	*Dyscinetus sp.*	Giuliano Trezzi
SCARABAEIDAE	*Euetheola sp.*	Giuliano Trezzi
SCARABAEIDAE	*Anomala valida*	Giuliano Trezzi
SCARABAEIDAE	*Aphodius sp.*	Giuliano Trezzi
TENEBRIONIDAE	*Zophobas sp.*	Giuliano Trezzi
TENEBRIONIDAE	*Phrenapates bennetti*	Giuliano Trezzi

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INSECTS		
FAMILY	SPECIES	REPORTED BY
NYMPHALIDAE	*Adelpha cytherea ssp. marcia*	Jean-Michel Maes
NYMPHALIDAE	*Agraulis vanillae ssp. incarnata*	Jean-Michel Maes
NYMPHALIDAE	*Anartia amathea ssp. fatima*	Jean-Michel Maes
NYMPHALIDAE	*Anartia jatrophae ssp. luteipicta*	Jean-Michel Maes
NYMPHALIDAE	*Anthanassa drusilla ssp. lelex*	Jean-Michel Maes
NYMPHALIDAE	*Antirrhaea miltiades*	Jean-Michel Maes
NYMPHALIDAE	*Archaeoprepona amphimachus ssp. amphimachus*	Jean-Michel Maes
NYMPHALIDAE	*Archaeoprepona camilla ssp. camilla*	Jean-Michel Maes
NYMPHALIDAE	*Archaeoprepona demophon ssp. centralis*	Jean-Michel Maes
NYMPHALIDAE	*Archaeoprepona demophon ssp. gulina*	Jean-Michel Maes
NYMPHALIDAE	*Caerois gertrudtus*	Jean-Michel Maes
NYMPHALIDAE	*Caligo atreus ssp. dionysos*	Jean-Michel Maes
NYMPHALIDAE	*Caligo eurilochus ssp. sulanus*	Jean-Michel Maes
NYMPHALIDAE	*Caligo ilioneus ssp. oberon*	Jean-Michel Maes
NYMPHALIDAE	*Caligo memnon ssp.memnon*	Jean-Michel Maes
NYMPHALIDAE	*Callicore lyca ssp. aerias*	Jean-Michel Maes
NYMPHALIDAE	*Callicore pitheas*	Jean-Michel Maes
NYMPHALIDAE	*Catoblepia orgetorix ssp. championi*	Jean-Michel Maes
NYMPHALIDAE	*Catonephele numilia ssp. esite*	Jean-Michel Maes
NYMPHALIDAE	*Ceratinia tutia ssp. tutia*	Jean-Michel Maes
NYMPHALIDAE	*Chloreuptychia arnaca*	Jean-Michel Maes
NYMPHALIDAE	*Chlosyne janais*	Jean-Michel Maes
NYMPHALIDAE	*Chlosyne janais*	Jean-Michel Maes
NYMPHALIDAE	*Cissia labe*	Jean-Michel Maes
NYMPHALIDAE	*Cissia pseudoconfusa*	Jean-Michel Maes
NYMPHALIDAE	*Cithaerias menander*	Jean-Michel Maes
NYMPHALIDAE	*Colobura dirce ssp. dirce*	Jean-Michel Maes
NYMPHALIDAE	*Consul fabius ssp. cecrops*	Jean-Michel Maes

NYMPHALIDAE	*Danaus eresimus ssp. montezuma*	**Jean-Michel Maes**
NYMPHALIDAE	*Dryadula phaetusa*	**Jean-Michel Maes**
NYMPHALIDAE	*Dryas iulia ssp.moderata*	**Jean-Michel Maes**
NYMPHALIDAE	*Ectima erycinoides ssp. erycinoides*	**Jean-Michel Maes**
NYMPHALIDAE	*Eresia clara*	**Jean-Michel Maes**
NYMPHALIDAE	*Eryphanis polyxena ssp. lycomedon*	**Jean-Michel Maes**
NYMPHALIDAE	*Eueides isabella ssp. eva*	**Jean-Michel Maes**
NYMPHALIDAE	*Fountainea eurypyle ssp. confusa*	**Jean-Michel Maes**
NYMPHALIDAE	*Hamadryas februa ssp. ferentina*	**Jean-Michel Maes**
NYMPHALIDAE	*Hamadryas feronia ssp. farinulenta*	**Jean-Michel Maes**
NYMPHALIDAE	*Hamadryas laodamia ssp. saurites*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius charthonius ssp. charithonius*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius cydno ssp. galanthus*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius erato ssp. petiveranus*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius hecale ssp. zuleika*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius ismenius*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius melpomene ssp. rosina*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius sapho ssp. leuce*	**Jean-Michel Maes**
NYMPHALIDAE	*Heliconius sara ssp. fulgidus*	**Jean-Michel Maes**
NYMPHALIDAE	*Hermeuptychia hermes*	**Jean-Michel Maes**
NYMPHALIDAE	*Historis acheronta ssp. acheronta*	**Jean-Michel Maes**
NYMPHALIDAE	*Historis odius ssp. dious*	**Jean-Michel Maes**
NYMPHALIDAE	*Hypothyris euclea ssp. valora*	**Jean-Michel Maes**
NYMPHALIDAE	*Magneuptychia libye*	**Jean-Michel Maes**
NYMPHALIDAE	*Manataria maculata*	**Jean-Michel Maes**
NYMPHALIDAE	*Marpesia merops*	**Jean-Michel Maes**
NYMPHALIDAE	*Mechanitis isthmia ssp. isthmia*	**Jean-Michel Maes**
NYMPHALIDAE	*Mechanitis lysimnia ssp.*	**Jean-Michel Maes**

	doryssus	
NYMPHALIDAE	*Memphis morvus ssp. boisduvali*	Jean-Michel Maes
NYMPHALIDAE	*Memphis proserpina*	Jean-Michel Maes
NYMPHALIDAE	*Memphis xenocles*	Jean-Michel Maes
NYMPHALIDAE	*Morpho granadensis ssp. polybatus*	Jean-Michel Maes
NYMPHALIDAE	*Morpho peleides ssp. limpida*	Jean-Michel Maes

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	INSECTS	
FAMILY	**SPECIES**	**REPORTED BY**
NYMPHALIDAE	*Myscelia pattenia*	Jean-Michel Maes
NYMPHALIDAE	Nessaea aglaura ssp. aglaura	Jean-Michel Maes
NYMPHALIDAE	*Nica flavilla ssp. canthara*	Jean-Michel Maes
NYMPHALIDAE	*Opsisphanes cassina ssp. fabricii*	Jean-Michel Maes
NYMPHALIDAE	*Opsisphanes invirae ssp. cuspidatus*	Jean-Michel Maes
NYMPHALIDAE	*Opsisphanes tamarindi ssp. tamarindi*	Jean-Michel Maes
NYMPHALIDAE	*Pareuptychia hesione*	Jean-Michel Maes
NYMPHALIDAE	*Pareuptychia metaleuca*	Jean-Michel Maes
NYMPHALIDAE	*Pierella helvetia ssp. incanescens*	Jean-Michel Maes
NYMPHALIDAE	*Pierella luna ssp. luna*	Jean-Michel Maes
NYMPHALIDAE	*Prepona omphale ssp. octavia*	Jean-Michel Maes
NYMPHALIDAE	*Pyrrhogyra otolais ssp. otolais*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis andromeda*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis celia ssp. keneza*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis mermeria ssp. excavata*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis nympha*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis penelea*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis salvini*	Jean-Michel Maes
NYMPHALIDAE	*Taygetis virgilia ssp. rufomarginata*	Jean-Michel Maes
NYMPHALIDAE	*Tithorea tarricina ssp. pinthias*	Jean-Michel Maes
NYMPHALIDAE	*Vareuptychia usitata ssp. usitata*	Jean-Michel Maes
PAPILIONEDAE	*Parides childrenae ssp.*	Jean-Michel Maes

	childrenae	
PAPILIONEDAE	*Parpides eurimedes ssp. mylotes*	Jean-Michel Maes
PAPILIONEDAE	*Parides panares ssp. lycimenes*	Jean-Michel Maes
PAPILIONEDAE	*Battus polydamas ssp. polydamas*	Jean-Michel Maes
PIERIDAE	*Aphrissa boisduvalii*	Jean-Michel Maes
PIERIDAE	*Eurema agave ssp.mana*	Jean-Michel Maes
PIERIDAE	*Eurema albula ssp. albula*	Jean-Michel Maes
PIERIDAE	*Eurema daira ssp. daira*	Jean-Michel Maes
PIERIDAE	*Eurema dina ssp.westwoodi*	Jean-Michel Maes
PIERIDAE	*Eurema nise ssp. nelphe*	Jean-Michel Maes
PIERIDAE	*Phoebis philea ssp. philea*	Jean-Michel Maes
SPHINGIDAE (Nocturnal)	*Aleuron neglectum ssp. neglectum*	Jean-Michel Maes
SPHINGIDAE	*Callionima inuus*	Jean-Michel Maes
SPHINGIDAE	*Callionima nomius*	Jean-Michel Maes
SPHINGIDAE	*Cocytius beelzebuth*	Jean-Michel Maes
SPHINGIDAE	*Enyo ocypete*	Jean-Michel Maes
SPHINGIDAE	*Erinnyis crameri*	Jean-Michel Maes
SPHINGIDAE	*Erinnyis ello ssp. ello*	Jean-Michel Maes
SPHINGIDAE	*Eumorpha capronnieri*	Jean-Michel Maes
SPHINGIDAE	*Eumorpha fasciata ssp. fasciata*	Jean-Michel Maes
SPHINGIDAE	*Eumorpha phorbas*	Jean-Michel Maes
SPHINGIDAE	*Eumorpha triangulum*	Jean-Michel Maes
SPHINGIDAE	*Hemeroplanes triptolemus*	Jean-Michel Maes
SPHINGIDAE	*Isognathus rimosus ssp. excelsior*	Jean-Michel Maes
SPHINGIDAE	*Madoryx pluto ssp. pluto*	Jean-Michel Maes
SPHINGIDAE	*Manduca florestan*	Jean-Michel Maes
SPHINGIDAE	*Pachylia derceta*	Jean-Michel Maes
SPHINGIDAE	*Pachylia ficus*	Jean-Michel Maes
SPHINGIDAE	*Pachylia syces ssp. syces*	Jean-Michel Maes
SPHINGIDAE	*Protambulyx strigilis ssp. strigilis*	Jean-Michel Maes
SPHINGIDAE	*Protambulyx xanthus*	Jean-Michel Maes
SPHINGIDAE	*Sphinx merops ssp. merops*	Jean-Michel Maes
SPHINGIDAE	*Xylophanes anubus ssp. anubus*	Jean-Michel Maes
SPHINGIDAE	*Xylophanes belti*	Jean-Michel Maes

SPHINGIDAE	*Xylophanes ceratomioides*	Jean-Michel Maes
SPHINGIDAE	*Xylophanes loelia*	Jean-Michel Maes
SATURNIIDAE (Nocturnal)	*Adeloneivaia boisduvalii*	Jean-Michel Maes
SATURNIIDAE	*Arsenura batesii ssp. arcaei*	Jean-Michel Maes
SATURNIIDAE	*Arsenura drucei*	Jean-Michel Maes
SATURNIIDAE	*Automeris tridens*	Jean-Michel Maes
SATURNIIDAE	*Citheronioides collaris*	Jean-Michel Maes
SATURNIIDAE	*Dysdaemonia boreas*	Jean-Michel Maes
SATURNIIDAE	*Eacles imperialis ssp. Decoris*	Jean-Michel Maes

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INSECTS		
FAMILY	**SPECIES**	**REPORTED BY**
SATURNIIDAE	*Othorene purpurascens*	Jean-Michel Maes
SATURNIIDAE	*Paradaemonia andensis*	Jean-Michel Maes
SATURNIIDAE	*Rhescynthis hippodamia ssp. norax*	Jean-Michel Maes
SATURNIIDAE	*Rothschildia lebeau ssp. inca*	Jean-Michel Maes
SATURNIIDAE	*Rothschildia orizaba ssp. triloba*	Jean-Michel Maes
SATURNIIDAE	*Syssphinx molina*	Jean-Michel Maes
SATURNIIDAE	*Syssphinx quadrilineata ssp. quadrilineata*	Jean-Michel Maes
BUPRESTIDAE	*Agrilus sp.*	Jean-Michel Maes
BUPRESTIDAE	*Taphrocerus sp.*	Jean-Michel Maes
COCCINELLIDAE	*Chilocorus cacti*	Jean-Michel Maes
HYDROPHILIDAE	*Dibolocoelus purpurascens*	Jean-Michel Maes
HYDROPHILIDAE	*Dibolocoelus smaragdinus*	Jean-Michel Maes
PASSALIDAE	*Veturius platyrhinus*	Jean-Michel Maes
PASSALIDAE	*Passalus sp.*	Jean-Michel Maes
SCARABAEIDAE - APHODIINAE	*Aphodius sallei*	Jean-Michel Maes
SCARABAEIDAE - APHODIINAE	*Aphodius nigrita*	Jean-Michel Maes
SCARABAEIDAE - DYNASTINAE	*Dyscinetus laevipunctatus ssp. laevipunctatus*	Jean-Michel Maes
SCARABAEIDAE – DYNASTINAE	*Ligyrus gyas*	Jean-Michel Maes

SCARABAEIDAE – DYNASTINAE	*Strataegus aloeus*	**Jean-Michel Maes**
SCARABAEIDAE – DYNASTINAE	*Strataegus hipposiderus*	**Jean-Michel Maes**
SCARABAEIDAE – DYNASTINAE	*Homophileurus quadrituberculatus*	**Jean-Michel Maes**
SCARABAEIDAE - DYNASTINAE	*Phileurus didymus*	**Jean-Michel Maes**
SCARABAEIDAE – RUTELINAE	*Anomala megalia*	**Jean-Michel Maes**
SCARABAEIDAE–SCARABAEINAE	*Eurysternus claudicans*	**Jean-Michel Maes**
GELASTOCORIDAE	*Gelastocoris variegatus*	**Jean-Michel Maes**
LYGAEIDAE	*Neortholomus jamaicensis*	**Jean-Michel Maes**
LYGAEIDAE	*Neortholomus albocincta*	**Jean-Michel Maes**
CERCOPIDAE	*Aeneolamia albofasciata*	**Jean-Michel Maes**
CERCOPIDAE	*Aeneolamia postica*	**Jean-Michel Maes**
CERCOPIDAE	*Mahanarva costaricensis*	**Jean-Michel Maes**
CERCOPIDAE	*Prosapia simulans*	**Jean-Michel Maes**
CERCOPIDAE	*Zulia vilior*	**Jean-Michel Maes**
CICADELLIDAE	*Agallia modesta*	**Jean-Michel Maes**
CICADELLIDAE	*Agrosoma pulchella*	**Jean-Michel Maes**
CICADELLIDAE	*Balclutha incisa*	**Jean-Michel Maes**
CICADELLIDAE	*Empoasca sp.*	**Jean-Michel Maes**
CICADELLIDAE	*Graminella cognita*	**Jean-Michel Maes**
CICADELLIDAE	*Graminella striatella*	**Jean-Michel Maes**
CICADELLIDAE	*Gyponana sp.*	**Jean-Michel Maes**
CICADELLIDAE	*Hortensia similis*	**Jean-Michel Maes**
CICADELLIDAE	*Ladoffa sannionis*	**Jean-Michel Maes**
CICADELLIDAE	*Macunolla ventralis*	**Jean-Michel Maes**
CICADELLIDAE	*Portanus tesselatus*	**Jean-Michel Maes**
CICADELLIDAE	*Phera obtusifrons*	**Jean-Michel Maes**
CICADELLIDAE	*Plesiommata corniculata*	**Jean-Michel Maes**
CICADELLIDAE	*Pseudophera contraria*	**Jean-Michel Maes**
CICADELLIDAE	*Tropicanus flectus*	**Jean-Michel Maes**
CICADELLIDAE	*Typhlocybella minima*	**Jean-Michel Maes**
CICADELLIDAE	*Xestocephalus albopunctatus*	**Jean-Michel Maes**
CICADELLIDAE	*Xestocephalus sp.*	**Jean-Michel Maes**
DELPHACIDAE	**(Unidentified)**	**Jean-Michel Maes**
DICTYOPHARIDAE	*Taosa herbida*	**Jean-Michel Maes**

MARGARODIDAE	*Icerya purchasi*	Jean-Michel Maes
MEMBRACIDAE	*Micrutalis sp.*	Jean-Michel Maes
MEMBRACIDAE	*Spissistilus festinus*	Jean-Michel Maes
MEMBRACIDAE	*Trichaetipyga sp.*	Jean-Michel Maes
PHLAEOTHRIPIDAE	*Actinothrips sp.*	Jean-Michel Maes
PHLAEOTHRIPIDAE	*Holopnothrips sp.*	Jean-Michel Maes
PHLAEOTHRIPIDAE	*Phrasterothrips conducans*	Jean-Michel Maes
PHLAEOTHRIPIDAE	*Selenothrips rubrocinctus*	Jean-Michel Maes
COENAGRIONIDAE	*Argia pulla*	Jean-Michel Maes
BLATTELLIDAE	*Riatia flabellata*	Jean-Michel Maes
ANISOLABIDAE	*Carcinophora americana*	Jean-Michel Maes
TERMITIDAE	*Nasutitermes corniger*	Jean-Michel Maes

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INSECTS		
FAMILY	**SPECIES**	**REPORTED BY**
RHIPIPTERYGIDAE	*Merhipipteryx pulicaria ssp. pulicaria*	Jean–Michel Maes
TETRIGIDAE	*Chiriquia serrata*	Jean–Michel Maes
TETRIGIDAE	*Scaria fasciata*	Jean–Michel Maes
TETRIGIDAE	*Scaria hamata*	Jean–Michel Maes
TETTIGONIIDAE	*Orophus sp.*	Jean–Michel Maes
TETTIGONIIDAE	*Balboa tibialis*	Jean–Michel Maes
TETTIGONIIDAE	*Gongrocnemis sp.*	Jean–Michel Maes
TETTIGONIIDAE	*Parascopioricus sp.*	Jean–Michel Maes
TETTIGONIIDAE	*Pristonotus tuberosus*	Jean–Michel Maes
TETTIGONIIDAE	*Lirometopum coronatum*	Jean–Michel Maes
EUCHARITIDAE	*Orasema sp.*	Jean–Michel Maes
VESPIDAE	*Parachertergus apicalis*	Jean–Michel Maes
VESPIDAE	*Agelaia areata*	Jean–Michel Maes
VESPIDAE	*Epipona guerini*	Jean–Michel Maes
VESPIDAE	*Mischocyttarus melanarius*	Jean–Michel Maes
VESPIDAE	*Polistes erythrocephalus*	Jean–Michel Maes
VESPIDAE	*Polistes sp.*	Jean–Michel Maes
VESPIDAE	*Polybia diguetana*	Jean–Michel Maes
VESPIDAE	*Polybia emaciata*	Jean–Michel Maes
VESPIDAE	*Polybia occidentalis*	Jean–Michel Maes
VESPIDAE	*Synoeca septentrionalis*	Jean–Michel Maes
LYCAENIDAE	*Eumaeus minijas*	Jean–Michel Maes

LYCAENIDAE	*Panthiades ochus*	Jean–Michel Maes
LYCAENIDAE	*Parrhasius polibetes ssp. polibetes*	Jean–Michel Maes
LYCAENIDAE	*Thecla iopas*	Jean–Michel Maes
HYDROPSYCHIDAE	*Smicrida varia*	Jean–Michel Maes

REPTILES		
FAMILY	**SPECIES**	**REPORTED BY**
ALLIGATORIDAE	*Caiman crocodilus*	Ruíz, Zúñiga, Lezama
	Crocodylus acutus	Ruíz, Zúñiga, Lezama
BOIDAE	*Boa constrictor*	Rafael García
	Corallus enydris	Fabio Buitrago
COLUBRIDAE	*Oxybelis aeneus*	Ruiz, Zúñiga, Lezama
CHELONIIDAE	*Eretmochelys imbricata*	Carlos Calvo
	Chelonia mydas	Carlos Calvo
	Caretta caretta	C. Lagueux
DERMOCHELYDAE	*Dermochelys coriacea*	C. Lagueux
EMYDIDAE	*Trachemys scripta*	Fabio Buitrago
	Rhinoclemys funerea	Ruíz, Zúñiga, Lezama
	Trachemys scripta	Ruíz, Zúñiga, Lezama
IGUANIDAE	*Basiliscus plumifrons*	Ruíz, Zúñiga, Lezama
	Basiliscus vittatus	Ruíz, Zúñiga, Lezama
	Ctenosaura similis	Ruíz, Zúñiga, Lezama
	Iguana iguana	Ruíz, Zúñiga, Lezama
	Norops acuaticus	Ruíz, Zúñiga, Lezama
	Norops lionotus	Ruíz, Zúñiga, Lezama
VIPERIDAE	*Porthidium nasutum*	Ruíz, Zúñiga, Lezama
	Bothrops asper	Fabio Buitrago
	Bothrops Schlegelii	Arnulfo Medina

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AMPHIBIANS		
FAMILY	**SPECIES**	**REPORTED BY**
BUFONIDAE	*Bufo marinus*	Ruíz, Zúñiga, Lezama
	Bufo coniferus	Fabio Buitrago
DENDROBATIDAE	*Dendrobates pumilio*	Ruiz, Zúñiga, Lezama
	Dendrobates auratus	Ruiz, Zúñiga, Lezama
	Colosthetus talamancae	Fabio Buitrago
HYLIDAE	*Hyla rutifela*	Fabio Buitrago

LEPTODACTYLIDAE	*Eleutherodactylus noblei*	Fabio Buitrago
	Leptodactylus pentadactylus	Fabio Buitrago
RANIDAE	*Rana vaillanti*	Fabio Buitrago

AMPHIBIANS		
FAMILY	**SPECIES**	**REPORTED BY**
AGOUTIDAE	*Agouti paca*	Ruíz, Zúñiga, Lezama
BRADYPODIDAE	*Choleopus hoffmani*	Ruíz, Zúñiga, Lezama
	Bradypus variegatus	Ruiz, Zúñiga, Lezama
CEBIDAE	*Alouatta palliata*	Ruiz, Zúñiga, Lezama
	Ateles geoffroyi	Ruíz, Zúñiga, Lezama
	Cebus capuchinus	Ruíz, Zúñiga, Lezama
CERVIDAE	*Odocoileus virginianus*	Ruiz, Zúñiga, Lezama
	Mazama americana	Ruiz, Zúñiga, Lezama
DASYPROCTIDAE	*Dasyprocta punctata*	Ruíz, Zúñiga, Lezama
PHYLLOSTOMIDAE	*Artibeus jamaicensis*	Arnulfo Medina
	Artibeus lituratus	Arnulfo Medina
	Artibeus watsoni	Arnulfo Medina
	Carollia perspicillata	Arnulfo Medina
DESMODONTIDAE	*Desmodus rotundus*	Ruíz, Zúñiga, Lezama
DIDELPHIDAE	*Philander opossum*	Ruíz, Zúñiga, Lezama
	Didelphis marsupialis	Ruíz, Zúñiga, Lezama
ECHIMYIDAE	*Proechimys semiespinosus*	Ruíz, Zúñiga, Lezama
FELIDAE	*Felis concolor*	Ruíz, Zúñiga, Lezama
	Panthera onca	Ruiz, Zúñiga, Lezama
MUSTELIDAE	*Mustela frenata*	Ruíz, Zúñiga, Lezama
	Tayra barbara	Ruíz, Zúñiga, Lezama
	Lontra longicaudis	Ruíz, Zúñiga, Lezama
MYRMECOPHAGIDAE	*Tamandua mexicana*	Ruíz, Zúñiga, Lezama
	Myrmecopaga tridactyla	Ruíz, Zúñiga, Lezama
	Microsciurus alfari	Ruíz, Zúñiga, Lezama

SCIURIDAE	*Sciurus variegatoides*	Ruíz, Zúñiga, Lezama
TAPIRIDAE	*Tapirus bairdii*	Ruíz, Zúñiga, Lezama
TAYASSUIDAE	*Tayassu pecari*	Ruíz, Zúñiga, Lezama
	Tayassu tajacu	Ruíz, Zúñiga, Lezama
TRICHECHIDAE	*Trichechus manatus*	Ruíz, Zúñiga, Lezama

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FISH				
FAMILY	SPANISH COMMON NAME	ENGLISH COMMON NAME	SPECIES	REPORTED BY
CARCHARHINIDAE	Tiburón toro	Bull shark	*Carcharhinus leucas*	Jaime Villa
PRISTIDAE	Pejesierras	Smalltooth sawfish	Pristis pectinatus	Jaime Villa
PRISTIDAE	Pejesierras	Sawfish	*Peje sierras*	Jaime Villa
LEPISOSTEIDAE	Gaspar	Tropical gar	*Atractosteus tropicus*	Jaime Villa
MEGALOPIDAE	Sábalo Real	Atlantic tarpon	*Tarpon atlanticus*	Jaime Villa
ANGUIBLIDAE	Anguila	American eel	*Anguilla rostrata*	Jaime Villa
OPLUCTHIDAE	Anguila gusano del Atlántico	Speckled worm eel	*Myrosphis puntatus*	Jaime Villa
CLUPEIDAE	Sabalete de cháves	Nicaragua gizzard shad	*Dorosoma chavesi*	Jaime Villa
HARENGULA	Arengue de pensacola	Pensacola herring	*Harengula pensacolae*	Jaime Villa
ENGRALIDAE	Anchoa	Anchovy	*Anchoa hepsetus*	Jaime Villa
ENGRALIDAE	Anchoa	Big-eye anchovy	*Anchoa lamprotaenia*	Jaime Villa
ENGRAULIDAE	Anchoa	(No common	*Anchoa parua*	Jaime Villa

		name)		
ENGRAULIDAE	Anchoita larga	Elongate anchovy	*Anchouiella elongata*	Jaime Villa
CHARACINIDAE	Sabalete	Blind cave fish	*Astyanax fasciatus*	Jaime Villa
CHARACINIDAE	Sabalete de Bransford	Longjaw tetra	*Bramocharax bransfordii*	Jaime Villa
ELOPIDAE	Sábalo del Atlántico	Ladyfish, tenpounder	*Elops saurus*	Jaime Villa
PIMELODIDAE	Chulín Guatemalteco	Guatemalan chulin	*Rhamdia guatemalensis*	Jaime Villa
CHARACINIDAE	Machaca	Machaca	*Brycon guatemalensis*	Jaime Villa
CHARACINIDAE	Sabalete	Creek tetra	*Bryconamericanus scleroparius*	Jaime Villa
CHARACINIDAE	Sabalito	Carlana tetra	*Carlana eigenmanni*	Jaime Villa
CHARACINIDAE	Sabalete de tortuguero	Tortuguero tetra	*Hyphessobrycon tortuguerae*	Jaime Villa
CHARACINIDAE	Sabalete de Guatemala	Guatemalan headstander	*Roeboides guatemalensis*	Jaime Villa
GYMNOTIDAE	Gimnoto cilíndrico	Knifefish	*Gymnotus cylindricus*	Jaime Villa
ARIIDAE	*Guicho*	Arius Catfish, Shark Catfish	*Arius assimilis*	Jaime Villa
ARIIDAE	*Bagre filamentoso*	Coco sea catfish	*Bagre filamentosus*	Jaime Villa
POECILIIDAE	*Olamina de*	Alfaro	*Alfaro*	Jaime Villa

	Alfaro		*cultratus*	
POECILIIDAE	*Pepesca Gaspar*	Pike livebearer	*Belonesox belizanus*	Jaime Villa
POECILIIDAE	*Olomina de Holdridgei*	Olomina	*Brachyrhapis hondrigei*	Jaime Villa
POECILIIDAE	*Pepesca de Nicaragua*	Nicaraguan mosquitofish	*Gambusia nicaraguensis*	Jaime Villa
ATHERINIDAE	*Sardina de Miller*	Silverside	*Melaniris milleri*	Jaime Villa
POECILIIDAE		Dwarf merry widow	*Phallichthys tico*	Jaime Villa
POECILIIDAE	*Olamina de Gill*	Gills molly, Costa Rica molly	*Poeciliia gillii*	Jaime Villa
POECILIIDAE	*Pepesca común*	Molly	*Poecilia sphenops*	Jaime Villa
POECILIIDAE	*Pepesca de Panamá*	(No common name)	*Priapichthys panamensis*	Jaime Villa
ATHERINIDAE	*Sardina de Hubbs*	Silverside	*Melaniris hubbsi*	Jaime Villa
CYPRINADONTIDAE		Isthmian rivuline	*Rivulus isthmensis*	Jaime Villa
SYNGNATHIDAE	*Pejelápiz*	Freshwater pipefish	*Pseudophallus mindii*	Jaime Villa
SYNGNATHIDAE		Opossum pipefish	*Oostethus lineatus*	Jaime Villa
SYNBRANCHIDAE	*Falsa anguila*	Blind swamp eel	*Ophisternon*	Jaime Villa
SYNBRANCHIDAE	*Falsa anguila*	Marbled swamp eel	*Synbranchus marmoratus*	Jaime Villa
CENTROPOMIDAE	*Róbalo*	Swordspine snook	*Cetropomus ensiferus*	Jaime Villa
CENTROPOMI	*Róbalo*	Fat snook	*Centropo*	Jaime Villa

DAE			*mus parallelus*	
CENTROPOMIDAE	*Calva*	Tarpon snook	*Centropomus pectinatus*	Jaime Villa
CENTROPOMIDAE	*Róbalo*	Common snook	*Centropomus undecimales*	Jaime Villa
CARANGIDAE	*Caballa*	Crevalle jack	*Caranx hippos*	Jaime Villa
CARANGIDAE	*Pámpano*	Skipjack or leather jack	*Oligoplites saurus*	Jaime Villa
LUTJANIDAE	*Cají*	Schoolmaster snapper	*Lutjanus apodus*	Jaime Villa
LUTJANIDAE	*Cabera*	Cubera snapper	*Lutjanus cyanopterus*	Jaime Villa
LUTJANIDAE	*Pargo manglero*	Mangrove snapper	*Lutjanus griseus*	Jaime Villa
LUTJANIDAE	*Perro*	Dog snapper	*Lutjanus jocus*	Jaime Villa
GERREIDAE	*Mojarra playera*	Evermann's lantern fish	*Diapterus evermanni*	Jaime Villa
GERREIDAE	*Mojarra playera*	Striped mojarra	*Diapterus plumieri*	Jaime Villa
GERREIDAE	*Mojarra playera*	Irish pompano	*Diapterus olisthestomus*	Jaime Villa
GERREIDAE	*Mojarra playera*	Rhomboid mojarra	*Diapterus rhombeus*	Jaime Villa
GERREIDAE	*Mojarra playera*	Silver mojarra	*Eucinostomus argenteus*	Jaime Villa
GERREIDAE	*Mojarra playera*	Slender mojarra	*Eucinostomus jonesi*	Jaime Villa
GERREIDAE	*Mojarra playera*	Flag fin mojarra	*Eucinostomus melanopterus*	Jaime Villa
GERREIDAE	*Mojarra playera*	Yellow fin mojarra	*Gerres cinereus*	Jaime Villa

GERREIDAE	*Roncador*	Atlantic grunt	*Pomadasys boucardi*	Jaime Villa
GERREIDAE	*Roncador*	Burro grunt, Crocro roughneck	*Pomadasys crocro*	Jaime Villa
CICHLIDAE	*Mojarra de Alfaro*	Alfaro mojarra	*Cichlasoma alfaro*	Jaime Villa
CICHLIDAE	*Mojarra rayada*	Striped mojarra	*Cichlidae*	Jaime Villa
CICHLIDAE	*Mojarra común*	Midas cichlid, mojarra	*Cichlasoma citrinellum*	Jaime Villa
CICHLIDAE	*Guapote lagunero*	Dow's cichlid, lagunero	*Cichlasoma dowi*	Jaime Villa

FISH				
FAMILY	SPANISH COMMON NAME	ENGLISH COMMON NAME	SPECIES	REPORTED BY
CICHLIDAE	*Guapotito*	Yellow jacket cichlid	*Cichlasoma friedrichsthalii*	Jaime Villa
CICHLIDAE	*Mojarra picuda*	Red devil	*Cichlasoma labiatum*	Jaime Villa
CICHLIDAE	*Carate pecho rojo*	Rose breasted cichlid	*Cichlasoma longimanus*	Jaime Villa
CICHLIDAE	*Palometa*	Black belt cichlid	*Cichlasoma maculicauda*	Jaime Villa
CICHLIDAE	*Guapote Barcino*	Jaguar cichlid	*Cichlasoma managuense*	Jaime Villa
CICHLIDAE	*Moga*	Nicaragua	*Cichlasom*	Jaime Villa

	amarilla	cichlid	*a nicaragüense*	
CICHLIDAE	*Carate*	Convict cichlid	*Cichlasoma nigrofasciatum*	Jaime Villa
CICHLIDAE	*Carate*	(No common name)	*Cichlasoma rostratum*	Jaime Villa
CICHLIDAE	*Moga verde*	Meek fish	*Cichlasoma tuba*	Jaime Villa
CICHLIDAE	*Mojarrita*	Rainbow cichlid	Herotilapia multispinosa	Jaime Villa
CICHLIDAE	Picaculo	Poor man's fish	Neetroplus nematopus	Jaime Villa
MUGILIDAE	*Lisa*	Flathead mullet	Mugil cephalus	Jaime Villa
MUGILIDAE	*Lisa*	White mullet	Mugil curema	Jaime Villa
MUGILIDAE	*Lisa*	Mullet	Mugil lisa	Jaime Villa
MUGILIDAE	*Lisa*	Fantail mullet	Mugil trichodon	Jaime Villa
MUGILIDAE	*Bobo del atlántico*	Barbu	Polydactylus virginicus	Jaime Villa
ELEOTRIDAE	*Pejechancho*	Fat sleeper	Dormitator maculatus	Jaime Villa
ELEOTRIDAE	*Guabina Lucia*	Large-scaled spiny cheek sleeper	Eleotris amblyopsis	Jaime Villa
ELEOTRIDAE		Spiny cheek sleeper	Eleotris pisonis	Jaime Villa
ELEOTRIDAE	*Dormiloncita*	Emerald sleeper	Erotelis smaragdus	Jaime Villa
ELEOTRIDAE	*Guabina del atlántico*	Bigmouth sleeper	Gobiomorus dormitor	Jaime Villa
ELEOTRIDAE	Guabina	Guabina	Guabina guabina	Jaime Villa
GOBIIDAE	*Temepechin del atlántico*	River goby, sandfish	*Awaous taiasica*	Jaime Villa

GOBIIDAE	*Guabinita*	Island frillfin	*Bathygobius mystacium*	Jaime Villa
GOBIIDAE	*Mapo*	Frillfin goby	*Bathygobius soporator*	Jaime Villa
GOBIIDAE	*Gobi*	Lyre goby	*Evorthodus lyricus*	Jaime Villa
GOBIIDAE	*Gobi*	Violet goby	*Gobioides broussonneti*	Jaime Villa
GOBIIDAE		Darter goby	*Gobionellus boleosoma*	Jaime Villa
GOBIIDAE		Sandfish	*Gobiojellus claytonii*	Jaime Villa
BOTHIDAE	*Sandifish*	Bay whiff	*Citharichthys spilopterus*	Jaime Villa
BOTHIDAE	*Sandifish*	Voodoo whiff	*Citharichthys uhleri*	Jaime Villa
SOLEIDAE	*Peje tortilla rayado*	Lined sole	*Achirus lineatus*	Jaime Villa
SOLEIDAE	*Peje tortilla*	Hogchoker sole	*Trinectes maculatus*	Jaime Villa
TETRAODONTIDAE	*Pejesapo*	Smooth puffer	*Lagocephalus laeuigatus*	Jaime Villa
TETRAODONTIDAE	*Inflador punteado*	Bandtail puffer	*Sphoeroides spengleri*	Jaime Villa
TETRAODONTIDAE	*Mutrus*	Checkered puffer	*Sphoeroides testudineus*	Jaime Villa

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BIRDS		
FAMILY	SPECIES	REPORTED BY
ACCIPITRIDAE	*Pandion haliaetus*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Elanoides forficatus*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Elanus caeruleus*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Buteogallus urubitinga*	Zúñiga, Lezama, Ruíz

ACCIPITRIDAE	*Busarellus nigricollis*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Parabuteo unicinctus*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Spizastur melanoleucus*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Hapia harpyja*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Morphus guianensis*	Zúñiga, Lezama, Ruíz
ACCIPITRIDAE	*Milvago chimachima*	Zúñiga, Lezama, Ruíz
ALCEDINIDAE	*Ceryle torquata*	Zúñiga, Lezama, Ruíz
ALCEDINIDAE	*Ceryle alcyon*	Zúñiga, Lezama, Ruíz
ALCEDINIDAE	*Chloroceryle amazona*	Zúñiga, Lezama, Ruíz
ALCEDINIDAE	*Chloroceryle americana*	Zúñiga, Lezama, Ruíz
ANATIDAE	*Dendrocygna autumnalis*	Zúñiga, Lezama, Ruíz
ANATIDAE	*Cairina moschata*	Zúñiga, Lezama, Ruíz
ANATIDAE	*Heliornis fulica*	Zúñiga, Lezama, Ruíz
ARDEIDAE	*Tigrisoma lineatum*	Zúñiga, Lezama, Ruíz
ARDEIDAE	*Tigrisoma mexicanum*	Zúñiga, Lezama, Ruíz
ARDEIDAE	*Ixobrychus exilis*	Zúñiga, Lezama, Ruíz
ARDEIDAE	*Bubulcus ibis*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Butorides s.Virescens*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Egretta caerulea*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Egretta rufescens*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Egretta thula*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Casmerodius albus*	Zuñiga, Lezama, Ruíz
ARDEIDAE	*Ardea herodias*	Zuñiga, Lezama, Ruíz
BUCCONIDAE	*Monasa morpheus*	Zuñiga, Lezama, Ruíz
CAPRIMULGIDAE	*Nyctidromus albicollis*	Zuñiga, Lezama, Ruíz
CAPRIMULGIDAE	*Caprimulgus carolinensis*	Zuñiga, Lezama, Ruíz
CATHARIDAE	*Numenius phaeopus*	Zúñiga, Lezama, Ruíz
CATHARIDAE	*Charadrius wilsonia*	Zúñiga, Lezama, Ruíz
CATHARIDAE	*Charadrius semipalmatus*	Zuñiga, Lezama, Ruíz

CATHARIDAE	*Cathartes aura*	Zuñiga, Lezama, Ruíz
CATHARIDAE	*Coragyps atratus*	Zuñiga, Lezama, Ruíz
CATHARIDAE	*Sarcoramphus papa*	Zuñiga, Lezama, Ruíz
CICCONIIDAE	*Micteria americana*	Zuñiga, Lezama, Ruíz
CICCONIIDAE	*Mesembrinibis cayennensis*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Columba cayennensis*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Columba flavirostris*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Columba nigrirostris*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Claravis pretiosa*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Columbina talpacoti*	Zuñiga, Lezama, Ruíz
COLUMBIDAE	*Leptotila verreauxi*	Zuñiga, Lezama, Ruíz
CRACIDAE	*Ortalis cinereiceps*	Zuñiga, Lezama, Ruíz
CRACIDAE	*Crax rubra*	Zuñiga, Lezama, Ruíz
CRACIDAE	*Penelope purpurascens*	Zuñiga, Lezama, Ruíz
CUCULIDAE	*Piaya cayana*	Zuñiga, Lezama, Ruíz
CUCULIDAE	*Crotophaga sulcirostris*	Zuñiga, Lezama, Ruíz
DENDROCOLAPTIDAE	*Dendrocincla fuliginosa*	Zuñiga, Lezama, Ruíz
DENDROCOLAPTIDAE	*Dendrocincla homochroa*	Zuñiga, Lezama, Ruíz
DENDROCOLAPTIDAE	*Sittasomus griseicapilus*	Zuñiga, Lezama, Ruíz
DENDROCOLAPTIDAE	*Glyphorhinchus spirurus*	Zuñiga, Lezama, Ruíz
DENDROCOLAPTIDAE	*Lepidocolaptes souleyetii*	Zuñiga, Lezama, Ruíz
FALCONIDAE	*Herpetotheres cachinnans*	Zuñiga, Lezama, Ruíz
FALCONIDAE	*Micrastur mirandollei*	Zuñiga, Lezama, Ruíz
FALCONIDAE	*Falco sparverius*	Zuñiga, Lezama, Ruíz
FALCONIDAE	*Micrastur semitorquatus*	Zuñiga, Lezama, Ruíz
FORMICARIIDAE	*Automolus ochrolaemus*	Zuñiga, Lezama, Ruíz
FORMICARIIDAE	*Xenops minutus*	Zuñiga, Lezama, Ruíz

FORMICARIIDAE	*Microrhopias quixensis*	Zuñiga, Lezama, Ruíz
FORMICARIIDAE	*Myrmotherula axillaris*	Zuñiga, Lezama, Ruíz
GALBULIIDAE	*Jacamerops aurea*	Zuñiga, Lezama, Ruíz
JACANIDAE	*Aramides cajanea*	Zuñiga, Lezama, Ruíz

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BIRDS		
FAMILY	**SPECIES**	**REPORTED BY**
JACANIDAE	*Porphyrula martinica*	Zúñiga, Lezama, Ruíz
JACANIDAE	*Jacana spinosa*	Zúñiga, Lezama, Ruíz
JACANIDAE	*Eurypyga helias*	Zúñiga, Lezama, Ruíz
LARIDAE	*Larus atricilla*	Zúñiga, Lezama, Ruíz
LARIDAE	*Sterna sp..*	Zúñiga, Lezama, Ruíz
MOMOTIDAE	*Electron carinatum*	Zúñiga, Lezama, Ruíz
PELECANIFORMES	*Pelecanus occidentalis*	Zúñiga, Lezama, Ruíz
PELECANIFORMES	*Phalacrocorax olivaceus*	Zúñiga, Lezama, Ruíz
PELECANIFORMES	*Anhinga anhinga*	Zúñiga, Lezama, Ruíz
PELECANIFORMES	*Fregata magnificens*	Zúñiga, Lezama, Ruíz
PICIDAE	*Melanerpes pucherani*	Zúñiga, Lezama, Ruíz
PICIDAE	*Celeus castaneus*	Zúñiga, Lezama, Ruíz
PICIDAE	*Dryocopus lineatus*	Zúñiga, Lezama, Ruíz
PICIDAE	*Campephilus guatemalensis*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Ara ambigua*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Ara macao*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Amazona farinosa*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Amazona autumnalis*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Pionus senilis*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Aratinga finschi*	Zúñiga, Lezama, Ruíz
PSITTACIDAE	*Aratinga nana*	Zuñiga, Lezama, Ruíz
PSITTACIDAE	*Brotogeris jugularis*	Zuñiga, Lezama, Ruíz
RALLIDAE	*Laterallus albigularis*	Zuñiga, Lezama, Ruíz
RAMPHASTIDAE	*Pteroglosus torquatus*	Zuñiga, Lezama, Ruíz
RAMPHASTIDAE	*Pteroglosus frantzii*	Zuñiga, Lezama, Ruíz
RAMPHASTIDAE	*Ramphastos sulfuratus*	Zuñiga, Lezama, Ruíz

RAMPHASTIDAE	*Selenidera spectabilis*	Zuñiga, Lezama, Ruíz
RAMPHASTIDAE	*Ramphastos swaimsonii*	Zuñiga, Lezama, Ruíz
SCOLOPACIDAE	*Actitis macularia*	Zuñiga, Lezama, Ruíz
STRIGIFORMES	*Tyto alba*	Zuñiga, Lezama, Ruíz
STRIGIFORMES	*Pulsatrix perspicillata*	Zúñiga, Lezama, Ruíz
STRIGIFORMES	*Glaucidium minutissimun*	Zúñiga, Lezama, Ruíz
TINAMIDAE	*Tinamus major*	Zuñiga, Lezama, Ruíz
TINAMIDAE	*Crypturellus boucardi*	Zuñiga, Lezama, Ruíz
TINAMIDAE	*Crypturellus soui*	Zuñiga, Lezama, Ruíz
TINAMIDAE	*Crypturellus cinnamomeus*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Glaucis aenea*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Phaetornis superciliosus*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Phaetornis guy*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Phaetornis longuemarus*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Thalurania colombica*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Amazilia tzacatl*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Hylocharis eliciae*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Amazilia rutila*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Trogon massena*	Zuñiga, Lezama, Ruíz
TROCHILIDAE	*Trogon rufus*	Zuñiga, Lezama, Ruíz

Annex 41

MEYRAT, ALAN, *THE BIOLOGICAL STRETCH OF SOUTHEAST NICARAGUA: IMPORTANT SPACE FOR THE CONSERVATION OF NATURE*, MARENA-ARAUCARIA, 2006 (EXTRACTS)

(-9-)

(...)

The Landscape and Ecosystems

Using an adaptation of the *Physiognomic – Ecological Classification System of Plant Formations of the Earth* published by UNESCO (Ellenberg & Mueiler-Dombois, 1987), at least 19 natural ecosystems and two ecosystems inhabited by humans were identified in Southeast Nicaragua (Meyrat, 2001a). Of the natural ecosystems, 15 are land systems and four are aquatic. Of the land ecosystems, there are 11 fores variants (ten evergreen forests, from coastal to submountainous in the continental zone, and one semi-deciduous forest on the Solentiname archipelago), three savanna variants and one riverine grassland variant. Of the aquatic ecosystems, two are marine / coastal systems (coastal lagoon and estuary) and two are freshwater systems (lake and freshwater plant mosaic). In the freshwater plant mosaic, there are at least seven types of ecosystems of dimensions that cannot be mapped on a large scale. For this reason, using a more detailed classification, it is possible to claim that there are 26 different ecosystems in the sector.

(...)

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In an undisturbed forest, no species can be considered dominant from the perspective of abundance. In neighboring forests in Costa Rica, some 273 vascular plant species (Hartshorn, 1983) combine to make up this type of plant formation. *Flora de Nicaragua* (Stevens et al., 2001) identifies 178 species, of which 39 are rare, 22 are uncommon and 15 have a restricted range of distribution from Nicaragua to Panama.

Typically, this forest has four strata:

1. The canopy of high trees (30 – 40 meters). This is formed by Andiroba (*Carapa guianensis*), Guanandi (*Calophyllum brasiliense*), Pansubá (*Lecythis ampla*), White oliver (*Terminalia amazonica*), Copinol (*Hymenea courbaril*), Chicle (*Manilkara chicle*) and Cortéz (*Tabebuia guayacan*).

2. Sub-canopy (10 – 15 meters) of medium and young replacement trees, including: Oil Tree (*Pentaclethra macroloba*), *Anaxagorea crassipetala*, Mangan Larga (*Xilopia bocatorena* and *X. sericea*), Cedar, Vaquero (*Dendropanax arboreus*), different Shimbillos (*Inga spp.*), Terciopelo (*Alchornea costarricense*), Wild Nutmeg (*Virola koschnyi*), Huito (*Genipa

americana), Peine de Mico (*Apeiba membranaceae*), Sangre de Mono (*Pausandra trianae*), Sietenudos (*Rinorea squamata*), accompanied by certain high palms (*Arecáceas*), Walking Palm (*Socratea exorrhiza*), Palmilera (*Welfia georgii*) and Copa Palm (*Iriartea deltoidea*).

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3.Low trees, replacement trees, high bushes and a variety of palms: Pasica (*Pouroruma bicolor*), Plátano (*Psycothria grandis*), *P. elata*, Capirote (*Miconia spp.*) Coligallo Palm (*Calyptrogyne ghiesbreghtiana*), Copa Palm (*Iriartea deltoidea*) and Arborescent Fern (*Cyathea multiflora*).

4.Low herbaceous plants of less than two meters in height, more or less open (may not be present in 50% of cases): abundant *Rubiaceae* and *Melastomataceae*, with palms of different genera and herbaceous ferns. The following are among the interesting components: Florida arrowroot (*Zamia spp.*) various palms: Palma Rooster Tail Palm (*Calyptrogyne sp.*), Palma Suita (*Asterogyne martiana*), Palma Caña de Danto (*Reinhardtia spp.* and *Geonoma spp.*), Chontadura (*Astrocaryum confertum*, recently reported in Nicaragua), herbaceous ferns (*Cnemidaria, Adiantum, Polypodium, Polystichum, Campyloneurum*) and Aequimea (*Aechmea magdalenae*).

The lianas (generally ligneous), pseudo-lianas (which germinate in the branches and then take root in the soil), and epiphytes are more or less abundant depending on the type of forest. On low terrain (near the coast) and high terrain (mountains), vascular epiphytes are more abundant due to the presence of mist. Predominant in the low canopy are encircling climbing epiphytes of the following families: *Araceae* (*Anthurium, Monstera, Syngonium*) *Ciclantaceae* (*Asplundia*) and certain ferns. Predominant in the higher canopy areas are the *Bromeliaceae* families (*Guzmania, Vrisea, Achmea, Tillandsia*),

(...)

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(...)

TAXONOMIC GROUP	SPECIES	GENERA	FAMILIES
FISH (LAKE)	47	29	16

AMPHIBIAN	**27**	**11**	**8**
REPTILES	**33**	**25**	**11**
BIRDS	**388**	**214**	**61**
MAMMALS	**60**	**51**	**23**
TOTAL	**555**	**330**	**119**

Table 1. Number of species, genera and families by taxonomic group of vertebrates in the Southeastern Zone of Nicaragua. Data from FUNDAR (2004), for Bird from Arróliga & Herrera – Rosales (2000) and for Fish de Astorqui (1984).

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(...)

Among the most commonly seen birds are eight species of psittacines, including four parakeets or "Chocoyos" and Cotorras (*Aratinga, Brotogeris, Jugularis* and *Pionus*), three Parrots (*Amazona*) and two Macaws: green (*Ara ambigua*) and red (*A. Macao*). In addition, there are three species of the most commonly seen toucans (one *Pteroglosus* and two *Ramphastos*). Very conspicuous are two species of Oropendolas (*Psarocolius spp.*) that make hanging nests grouped in tree branches (FUNDAR, 2004).

There are three species of birds with high hunting value for the local population: typical guans (*Penelope*), curassows (*Crax*) and tinamous (*Tinamus*). The most important raptors include the American Harpy Eagle (Harpia harpyia) and the Crested Eagle (Morphnus guianensis) (FUNDAR, 2004).

A total of 60 species of **mammals** have been identified in the zone: five didelphids (*Zarigueyas*), five edentates (armadillos and similar mammals), 26 bats, three monkeys, seven rodents, nine carnivores, one perissodactyle (tapir) and four artiodactyls (pigs and deer). Among these mammals, 39 are covered by legal protection due to a certain level of vulnerability (CITES, appendixes I, II, III or national hunting bans). More studies have been carried out on mammals than on other groups, covering ecological aspects: on the Manatee (Jiménez, 1999), on the Wild Boar or Jabalí (Altritcher & Jiménez, 1999),

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on Danto and Jaguar distribution and the hunting of species (Almanza & Medina, 2001).

Among the Toothless are: the Giant Anteater (*Myrmecophaga*), the Common Anteater (*Tamandua*), the Sloth (*Choloepus*) and the Armadillo (*Dasypus*) (FUNDAR, 2004). Primates (monkeys) include three species, the most common of which is the Congo or Howler Monkey (*Alouatta*), followed by the Spider Monkey (*Ateles*); the third and least common species is the White-faced Monkey (*Cebus*). Six species have been recorded under the order of carnivore: Coati (*Nasua*), Kinkajou (*Potos*), Tayra (*Eira*), an American Otter (*Lontra*) and three species of felines: the Ocelot (*Leopardus*), the Jaguar or American Tiger (*Panthera*) and the Puma or American Lion (*Puma*) (FUNDAR, 2004).

Under the perissodactyle order is the Danto or Tapir (*Tapirus*). Of the four species of artiodactyls (pigs and deer), two are endangered: the White-lipped Peccary (*Tayassu*) and the Wild Boar or Jabalí (*Dicotyles*). The other two species are more abundant: the White-tailed Deer (*Odocoileus*) and the timid Brocket Deer (*Mazama*) (FUNDAR, 2004). There are 26 species of bats with strong populations. Most are of the subfamily Phillostomidae. There are three species of larger rodents: Common Agouti (*Dasyprocta*), Paca (*Agouti*) and the Porcupine (*Coendou*). There are four known species of smaller rodents, the most important of which is the Central American dwarf squirrel (*Microsciurus alfari*) (FUNDAR, 2004).

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A large number of insect species have been collected by naturalists in transit since the days of inter-oceanic transport. Collections are currently being taken according to taxonomic group by the Entomological Museum of León, focusing mainly on Lepidoptera and Coleoptera. There are three new reports of Lepidoptera Sphingidae for Nicaragua. Under the Coleoptera order, several Scarabaeidae are new to Nicaragua, in the subfamilies Rutelinae and Dynastinae (Jean-Michel Maes, in litteris).

Aquatic Fauna

The American otter (*Lontra*), crocodile (*Crocodylus*) and caiman (*Caiman*) are seen in rivers, channels and lagoons. The caiman is found in the most extensive area, reaching the coastal zones and mangroves, similar to the herbivorous mammal, the manatee (*Trichecus*) (FUNDAR, 2004).

The Caribbean coast is used by different species of turtle to nest, including the green sea turtle (*Chelonia mydas*), the Caguama or loggerhead sea turtle (*Careta careta*), the black sea turtle (*Chelonia agassizii*) and the Atlantic leatherback turtle (*Dermochelys coriacea*) (Lageux, 2000). According to Nietschmann (1977), the best egg-laying sites of the hawksbill sea turtle (*Eretmochelys imbricatta*) are found to the south.

According to Astorqui (1984), 47 species of fish are found in Lake Nicaragua, grouped into 29 genera of 16 families (listed in Meyrat et al., 2001b). The San Juan River is one of the migratory routes for saltwater species whose special osmotic adaptation to brackish and freshwater conditions is unique in the

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world and of great interest to scientists (Villa, 1982). Among these species are the bull shark (*Carcharhinus leucas*) and two species of sawfish (*Pristis pectinatus* and *P. perotteti*). Other migratory fish include the tarpon (*Tarpon atlanticus*), the fat snook (*Centropomus parallelus*), the tropical gar (*Atractosteus tropicus*) and the bigclaw river shrimp (*Macrobrachium carcinus*), which are in high demand and can be bred in ponds. Migratory aquatic species are of great value to local fishers along the San Juan River and on Lake Cocibolca. In their journey via the San Juan River, these species face several bottleneck sectors, one of which is in front of El Castillo. In 1982, Villa referred to the effects of fishing of the populations of several species. These observations have since been confirmed by local inhabitants.

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Wood Varieties

There is a broad variety of precious woods in the territory. The best known timber tree is the Granadillo, Ñambar, Cocobolo or Rosewood (Dalbergia retusa), the wood from which has beautiful graining, natural shine and a natural insecticide to preserve it. In the US market for materials for sculptors and artisans, this wood is valued at US$ 40 per kilogram, regardless of the shape of the piece. Other precious woods include Granadillo (Platymiscium spp.), Copinol (Hymenea courbaril) and Mora (Maclura tinctorea), all with high demand and value among local artisans in the department of Masaya. The following species are commonly used to make quality furniture:

Big Leaf Mahogany (Swietenia macrophylla), Spanish Cedar (Cedrela odorata), Laurel (Cordia alliodora), Pansubá or Olla de Mono Pot (Lecythis ampla), Batibatra (Enterolobium shomburkii) and Pink Poui (Tabebuia rosea). With opposite qualities, Balsa wood (Ochroma pyramidal) is very light and was used in the past as an insulator for the packing of fragile articles and for the fabrication of life preservers. Balsa has now been replaced by plastics for these uses. The wood's current usage is limited to the manufacturing of souvenirs (brightly-colored birds and fishes), a specialty of the artisans of Solentiname.

Certain trees provide wood of high durability under stress, torsion and wear and are used as high-wire posts and fence posts, pillars in house construction, planks for flooring and guardrails for trucks. However, few national sawmills have appropriate machinery to cut these species, which include: Oil tree (Pentaclethra macroloba), Chicle (Manilkara chicle), Almendro (*Dipteryx oleifera*), Cabbage angelin (*Andira inermis*), Nancitón (*Hyeronima alchorneoides*), Comenegro (*Dialium guianensis*) and Goncalo alves (*Astronium graveolens*). The following are among the wood species used and sold locally: Guarandi (*Calophyllum brasiliense*), Guasimo Colorado (*Luehea seemannii*), Kamibar (*Copaifera aromatica*), Andiroba (*carapa guianensis*), Kapok (*Ceiba pentandra*), Wild Cashew (*Anacardium excelsum*), Guayabo (*Terminalia spp.*) and Pronto Alivio (*Guarea sp.*).

Plants of Ecological Value

Certain plants have high value as important food sources for multiple species of fauna, from insects to mammals. The most important and conspicuous of these plants include: Almendro (*Dipteryx oleifera*), Guaba Cuajiniquil (*Inga vera spuria*), Zygia (*Pithecellobium latifolium*), Canelo Negro (*Nectandra reticulata*), Azufre (*Garcinia edulis*), Matapalos or Higerones (*Ficus spp.: F. glabrata; F. maxima; F. tonduzii; F. pertusa*), and Papaya de Monte (*Carica pennatula*). Some of these trees are host to different species of epiphytes and shelter iguanas and various birds. Certain epiphytic bromeliads form micro-lagoons that accumulate water, where the eggs and tadpoles of several species of small frogs and salamanders are laid and develop.

Annex 42

MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES, *INDIO MAÍZ BIOLOGICAL RESERVE MANAGEMENT PLAN, 2005-2010 PERIOD*, FOURTH VERSION, 9 MAY 2006 (EXTRACTS)

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c.7. Fauna:

The existence of diverse ecosystems and habitats in the Indio Maíz Biological Reserve allows for the presence and development of a large diversity of American tropical wildlife fauna until now unknown. There are no complete fauna studies for this Reserve; the reports that have been obtained are the result of rapid ecological assessments and scientific expeditions, following the redefinition of the boundaries of all protected areas in Southeast Nicaragua (Government of Nicaragua. 1999e), which are summarized in Table 3.

The group of birds is very diverse. Numerous species of terrestrial and aquatic birds live in or transit through the reserve. To date, a total of 221 species have been identified.

Among the most common species are the olive tanager (*Chlorothraupis carmioli*), red-throated ant-tanager (*Habia fuscicauda*), tawny-crested tanager (*Tachyphonus delattrii*), black-headed trogon (*Trogon melanocephalus*), rufous motmot (*Baryphthengus martii*) and oropendolas (*Psarocolius montezuma* and *P. Wagleri*), among others.

Bird species of great national and international importance, which are in danger of extinction and contained in the lists of species protected by the Government of Nicaragua, CITES Annexes, and total and partial closed seasons, live in the well-conserved forest of the Reserve. These include, inter alia, the American harpy eagle (*Harpia harpyja*), a species that needs extensive forested areas like those existing in this Reserve in order to survive, the great green macaw (*Ara ambigua*), whose population has been reduced by habitat alterations, deforestation and illegal trafficking, and the Three-wattled bellbird (*Procnias trucarunculata*), a species included in the IUCN's global red list for Nicaragua.

The coastal marine zone is a major habitat for aquatic and seabirds in the Caribbean. There are abundant flocks of migratory species, among others, golden plovers, western sandpipers and Peruvian boobies. There is also an abundance of herons, seagulls, frigates and pelicans. In the shore forests, an endless number of bird species has been observed that reside close to bodies of water, among others: herons, golden plovers, common kingfishers and tanagers. A particularly colourful species is the sunbittern (Eurypyga helias, found in streams and rocky gullies.

Mammals are represented by 65 species. The excellent state of conservation of the Reserve allows for the existence of stable populations of mammals in danger of extinction, which have been eradicated from other zones of the country, including, among others: peccaries (*Dicotyles pecari* and *Tayassu tajacu*), Baird's tapirs (*Tapirus bairdii*) and three feline species (*Pantera onca, Puma concolor* and *Leopardus pardalis*).

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The chiroptera order is the best represented, with 27 species, among which the species of the Phyllostomidae family stand out. The chiropteres maintain important ecological relations in the forest, acting as seed dispersers, pollinators and biological controllers.

The Indio Maíz Biological Reserve houses abundant and excellent habitats to maintain an important population of manatees (*Trichechus manatus*). This herbivorous aquatic mammal species, characteristic of the American tropics, is a highly valued and important species threatened by extinction. This large and human-like mammal is an important part in the mythology of different indigenous groups that live in the region (Jiménez, 1998).

The herpetofauna of the Indio Maíz Biological Reserve is represented by 55 reptile and 34 amphibian species. The Reserve houses approximately 33% of the national herpetofauna, according to the registrations presented by Kolher, 2001; Ruíz and Buitrago 2003.

Species of great importance are found in the coastal marine zone, including hawksbill, leatherback and green sea turtles (*Eretmochelys imbricata, Dermochelys coriacea* and *Chelonya mida*). The populations are on the decline due to predation of nests and shrimp boats that do not use turtle excluder devices (TED), recommended to prevent capture and death of sea turtles in their dragnets.

Among others, reptilian (*Norops limifroms, Corytophanes cristatus, Ameiva festiva* and *Iguana iguana*) and amphibian (*Dendrobates auratus, D. pumilio, Rana warszewitschii* and *Eleutherodactylus fitzingeri*) species are broadly distributed in the forested area. The range of distribution of the yellow-flecked glassfrog (*Cochranella albomaculata*), which was found in this reserve by Paez, et al in 2004, has extended from north to south given that it has been reported in the Saslaya hill in the Atlantic North. The iguanidae (*polychrus gutturosus*) species has also been confirmed in Nicaragua.

The reserve's hydro-biological resources are little documented. However, there is an immense potential for aquatic fauna in the rivers and coastal marine zone, as well as migratory species of great economic value, such as lobster, sea bass and fat snook. The Caribbean spiny lobster (*Panalirus argus*) travels from the north of Puerto Cabezas to spawn in the rocky marine platform of San Juan de Nicaragua. This coastal marine zone also has marine shrimp species, which are heavily commercially exploited by artisan fishermen, although industrial shrimp boats also capture these species illegally in zones that are prohibited under the Fishing Law, which provides that industrial fishing in zones that are earmarked for artisan fishing or in unauthorized zones is a serious crime. (Government of Nicaragua 2004)

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A very important species in the diet of the Rama indigenous community is the bigclaw river shrimp (*Macrobranchiun carcinus*), a large-size species of excellent flavour. Since this species is commercially important, there is strong pressure on its natural population. These shrimps migrate to spawn in the brackish waters of the estuaries.

In the rivers and streams of the reserve, machaca and rainbow bass (*Brycon guatemalensis* and *paereochromus spp*) are the predominant species (Urteaga, 2002). Large fish are also found in these rivers, such as the tropical gar (*Atractosteus tropicus*), a species of great ecological value in the rivers of the reserve, which is subject to significant bi-national fishing activity for sports fishermen.

The insect group is very diverse. Preliminary studies report 149 species. The most prominent insect species are indicative of the level of conservation or alteration of the habitats. In 2004, Arana and Tórrez found the presence of the clear wing butterfly (*Cithaerias menander*), whose population declines as disturbances increase. The host plant of this species is unknown, but adults feed on fruits and mushrooms that are decomposing, which usually occurs in a closed canopy forest. They also found that the abundant population of the giant beetle (*Phyllophaga gigantea*) declines as the disturbance of the landscape increases. This proves that this species is indicative of disturbances, is highly humid bio-geographical zones. On the other hand, the relative abundance of the scarab beetle (*Dyscinetus laevipunctatus*) species increases as the disturbance of the habitat increases. Although, this species is characteristic of a semi-aquatic habitat.
In the Indio Maíz Biological Reserve, the Scarabaeidae species (*Cyclocephala fulgurata*) was first reported in Nicaragua in 2004 by Arana and Tórrez, as well as the Darwin Hawkmoth (*Amphimoea walkeri*), which had not been captured in the country since mid-19th century.

Table 3. **Consolidated List of Fauna Species, Indio Maíz Biological Reserve**

Taxonomic Group		**Birds**	**Mammals**	**Amphibians**	**Reptiles**	**Fish**	**Insects**
	VPN	**16**	**8**	**3**	**5**		
	VNI	**24**	**15**		**2**		
Species in national closed seasons	**I**	**3**	**8**		**1**		
Species in CITES Appendixes	**II**	**32**	**4**	**2**	**5**		
	III	3	8		3		
	VC	3	8	6	7		
	RL	1	8		2		
Total species		221	65	34	55	**149**	
Migratory species		**29**					

(...)

a. Diversity and wealth of species

a.1. Flora and Fauna

The existence of large, well-conserved humid tropical forests, temporarily flooded sites and coastal marine areas give to the Reserve a unique characteristic of wealth and diversity of plant species and ecosystems.

A total of 369 plant species have been recorded (Fundar database, 2004). New flora species have been identified for Nicaragua, including five palm species, one of them being a new report for science (Coronado 2000).

To provide an overall idea of the area's importance, we can highlight some species of great ecological and economic value and beauty that so far have only been

sighted in this Reserve, including, among others: (*Lycopodiella* sp.) in the undergrowth and (*Podocarpus guatemalensis* and *Colpothrinax aphanopetala*) among the brushwood (Rayos and Pilarte, 2004).

The degree of conservation allows for the presence of a great diversity and wealth of fauna species in this reserve. Reports have been mainly based on scientific expeditions and rapid ecological assessments, indicating the presence of 221 bird species (27 migratory) (Amigos de la tierra 1996, Arróliga et al 2002, Arróliga and Herrera - Rosales 2004), 65 mammal species (Amigos de la tierra 1996, Medina et al 2002, Arróliga and Herrera Rosales 2004), 34 amphibian species, 55 reptile species and 57 insect species (Amigos de la Tierra 1996, Schmidt and Blas, 2002). It is also known that the Caribbean spiny lobster (*Panulirus argus)* and four Caribbean shrimp species *Panaeus* spp travel to the coastal marine zone of the reserve. The river shrimp (*Macrobrachium carcinus)* has also been found in the rivers that cross the reserve. In addition, 24 fish species have been identified (Amigos de la Tierra 1996, Urteaga 2002).

a.2. Heraldic Value

In a natural habitat like the Indio Maíz Biological Reserve, each species performs a specific function, which makes them all important. Some species, however, are particularly valuable given their uniqueness or level of threat and could be representative of the value of this Reserve. The species identified for its heraldic value is the manatee (*Trichechus manatus*), a little known herbivorous mammal which reaches up to three meters in length and weighs more than half a ton. Only three manatee species exist in the world, all of which are in danger of extinction (Jiménez 2000). The species found in this reserve is only found in the Caribbean Sea and it is very scarce.

Annex 43

PUBLIC PROSECUTOR'S OFFICE OF SAN CARLOS, RIO SAN JUAN, NICARAGUA, "CRIMINAL COMPLAINT 000/06", 21 DECEMBER 2006

PROVINCIAL PUBLIC PROSECUTOR, SAN CARLOS, SAN JUAN RIVER

Criminal Complaint No. 000/06

MISTER JUDGE FOR CRIMINAL DISTRICT HIGH COURT OF SAN CARLOS (R.S.J.)

I: SERGIO ENRIQUE PEREZ MARTINEZ, of age, single, Auxiliary Public Prosecutor of San Juan River, en representation of the Public Ministry, with Credential Number 00378 and of this residence – Before you with due respect, I appear, and put forward:

(...)

II – IDENTIFICATION OF THE VICTIM

Nicaraguan society

III – FACTS:

1. On the seventeenth of December of two thousand and six, in the hours of the night, a group of persons originating from the sister Republic of Costa Rica entered our national territory through the sector of La Penca, armed with machetes, shovels, hoes, rakes, rope, hammocks, plastic or other articles or tools that were used by the accused **Saturnino Méndez López, Bernardo Téllez Reyes, Pedro Joaquín Herradora Enríquez, Tito Modesto Amador Sequeira, Claudio José Lazos Medinas, Rodolfo René Omier Velásquez, Terencio Díaz Somoza, Juan Francisco Garcías Cárdenas, José Yino Oporta Gaitán, Miguel Ruiz Dávila, José Gabriel Reyes López, Marvin Augusto Omier Reyes, Nemesio Guadalupe López, Reinaldo Antonio Manzanares, Justo Rufino Téllez Romero, Bríjido Sánchez Garcías, Gregorio Martínez Jarquín, Juan Francisco Blandón González, Nicolás Flores Flores and Eduardo Alvarado** for the purpose of penetrating, invading and permanently settling in the protected area known as the "River San Juan Wildlife Refuge," which forms part of the Southeastern Nicaragua Biosphere Reserve…

(…)

Annex 44

"THE ANNOTATED RAMSAR LIST: NICARAGUA", *THE RAMSAR CONVENTION ON WETLANDS*

SOURCE: HTTP://WWW.RAMSAR.ORG/PROFILE/PROFILES_NICARAGUA.HTM

The Ramsar Convention on Wetlands

The Annotated Ramsar List: Nicaragua

The Annotated Ramsar List of Wetlands of International Importance

NICARAGUA

The Convention on Wetlands came into force for Nicaragua on 30 November 1997. Nicaragua presently has 8 site designated as a Wetland of International Importance, with a surface area of 405,691 hectares.

(...)

Cayos Miskitos y Franja Costera Immediata. 08/11/01; Atlántico Norte; 85,000 ha; 14°23'N 082°46'W. Marine Biological Reserve. Offshore Caribbean island and shoals and adjacent mainland coastal areas 12km to the west, comprising an impressive array of wetland types, principally frequently-flooded areas dominated by shrubs, riverine systems in which are found gallery forests, and estuaries bordered by mangrove forests in near-natural state. At the Cayos Miskitos Reserve, there is one of the largest extensions of sea grass in the Caribbean, intermingled with coral reefs, areas which support several rare and endangered species, including the Green Turtle (Chelonia mydas), Hawksbill Turtle (Eretmochelys imbricata), the Caribbean manatee (Trichechus manatus), the "Tucuxi" freshwater dolphin Sotaliafluviatilis, and caiman crocodile (Crocodylusfuscus). The Association of Indigenous Women of the Costa Atlántica recently initiated a promising ecotourism project. Ramsar site no. 1135. Most recent RIS information: 2001.

Deltas del Estero Real y Llanos de Apacunca. 08/11/01; Chinandega; 81,700 ha; 12°53'N 087°13'W. Natural Reserve. An estuarine ecosystem that is part of the large mangrove systems of the Golfo de Fonseca shared with El Salvador and Honduras, marked by semi-intensive and extensive shrimp cultivation, fishing, and agriculture. Within the site some 35 species of fauna have been identified, and part of the site was declared a Reserve for

Genetic Resources in 1996 in order to preserve a species of wild maize (Zea luxurians or nicaraguensis) that is endemic to Nicaragua and found only in this area. The original diversity of the site has suffered from human impacts such as agrochemical and organic waste, sedimentation, deforestation, and excessive hunting. Ramsar site no. 1136. Most recent RIS information: 2001.

Lago de Apanás-Asturias. 08/11/01; Jinotega; 5,415 ha; 13°10'N 085°58'W. An artificial lake or reservoir formed by two electricity-producing barrages of the Río Tuma in the mountainous north of the country, characterized by seasonally flooded agricultural land, water storage areas, and canals for transport and drainage. The endangered Perro de Agua "water dog" (Plata Otter, Lutra longicaudis) is supported, and the site is also important for a number of aquatic birds and for fish, a number of which have high economic value in the area. The site has high potential for ecotourism because of its migratory birds and artisanal fishing practices, and recreational and educational potentials are high as well. Ramsar site no. 1137. Most recent RIS information: 2001.

Los Guatuzos. 30/07/97; 43,750 ha; 1 1°00'N 084°52'W. Lakes and ponds subject to seasonal flooding, set in alluvial depressions with surrounding woodlands. There are also areas that are normally dry where the water table is several centimetres below the surface. The interaction of unique environmental factors has given rise to rich populations of flora and fauna both indigenous and migratory. 326 bird species, of which 77 species are migratory, 32 mammal and 10 reptile species are supported. There are several species of birdlife threatened with extinction. Ramsar site no. 915.

Most recent RIS information: 2001.

Refugio de Vida Silvestre Río San Juan. 08/11/01; Río San Juan, Atlántico Sur; 43,000 ha; ca.10°56'N 083° 40'W. Wildlife Refuge, Biosphere Reserve. A long, slender, convoluted site that follows the course of the Río San Juan, which flows from Lake Nicarague at 32m altitude along the Costa Rican frontier 200km to the city of San Juan del Norte on the Caribbean coast, and includes the coastline to the north as well, part of the Biosphere Reserve Indio Maiz, forming one of the two most extensive biological nuclei of the Mesoamerican Biological Corridor. The site comprises an array of wetland types, including estuary and shallow marine waters, coastal freshwater lagoon, and intertidal marsh, as well as permanent lakes, rivers, and pools, inter alia. Nearly all of the Ramsar Criteria are met, and four species of turtles, as well as the manatee Trichechus manatus, are supported. Ramsar site no. 1138. Most recent RIS information: 2001.

Sistema de Humedales de la Bahía de Bluefields. 08/11/01; Atlántico Sur; 86,501 ha; 1 1°55'N 083°45'W. Added to the Montreux Record, 15/01/07. Comprising a diversity of ecosystems from saline to freshwater, encompassing the "bay", which is in fact a coastal lagoon associated with the Río Escondido. The intertidal forested areas and mangroves form habitat and biological corridors for endangered larger animals, such as the jaguar (Pantera onca), Central American Tapir or "Danta" (Tapirus bairdii), the howling monkey Alouatta fusca, and ocelot Leoparduspardalis. The system is regenerating despite the devastation of Hurricane Joan in 1988. The site is extremely important for the artisanal fishing which forms the economic and cultural base of the ethnic groups in the area. Problems associated with population growth and pollution pose threats, though several communities have organized a group of communal park-wardens. Subject of a Ramsar Advisory Mission in December 2005 and added to the Montreux Record on 15/01/07. Ramsar site no. 1139. [Signs] Most recent RIS information: 2001.

Sistema de Humedales de San Miguelito. 08/11/01; Río San Juan; 43,475 ha; 1 1°25'N 084°51'W. Situated along the southeast coast of Lago Cocibolca (Lake Nicaragua, the largest lake in Central America), the site maintains a rich biological diversity, supporting a large number of species of birds, fish, reptiles and mammals. It also performs essential functions in the prevention of natural disasters, in purifying and recycling the water of the lake, and in regulating local climate. Ramsar site no. 1140. Most recent RIS information: 2001.

Sistema Lagunar de Tisma. 08/11/01; Managua, Granada; 16,850 ha; 12°04'N 085°56'W. A number of small lake, marsh, and river shore ecosystems associated with the northwest shores of Lake Nicaragua. The sites supplies water for cattle grazing, rice cultivation, and irrigation of pastures, recharges groundwater and assists in flood control, retains sediments and contaminants, and supports a number of species of migratory birds. Inhabitants of the site benefit by meat and fish and derive fiber materials for the fabrication of handkerchiefs, mats, fans, and other handicrafts. Rice cultivation and resulting alterations of water level and agrochemical effects have a direct impact upon the site. The Audobon Society Nicaragua and the IUCN Mesoamerica Office assisted in preparation of the designation and in the ongoing development of a management plan, with support from the government. Most recent RIS information: 2001.

For further information about the Ramsar Convention on Wetlands, please contact the Ramsar Convention Bureau, Rue Mauverney 28, CH-1 196 Gland, Switzerland (tel +41 22 999 0170, fax +41 22 999 0169, e-mail ramsar@ramsar.org). Posted 31 January 2000, updated 15 January 2007, Dwight Peck, Ramsar.

Annex 45

BIOSPHERE RESERVE INFORMATION FOR RÍO SAN JUAN, UNESCO-MAB BIOSPHERE RESERVES DIRECTORY

SOURCE: HTTP://WWW.UNESCO.ORG/MABDB/BR/BRDIR/
DIRECTORY/BIORES.ASP?MODE=ALL&CODE= NIC+02

United Nations Educational, Scientific and Cultural Organization

The MAB Programme

UNESCO – MAB Biosphere Reserves

Directory

Biosphere Reserve Information

Nicaragua

RÍO SAN JUAN

General Description Covering 1,392,900 ha Río San Juan Biosphere Reserve iscomposed of seven protected areas and other adjacent territories. The biosphere reserve covers an important variety of ecosystems representative of tropical humid forests and wetlands, tidal marsh, coastal lagoons and estuaries which are important shelters for rare or threatened animals and plant genetic resources of the meso-American tropics. Furthermore the biosphere reserve includes a part of Lake Cocibolca and the municipalities of El Almendro, San Miguelito, Morrito and Nueva Guinea with a large (256,000 habitants) and culturally rich human population including 20,000 habitants of Rama, Miskitu, Negra and Creole ethnic groups. Each one of these groups has its own way of preserving and/or using the national resources of the area.

The vast size of the biosphere reserve, in addition to its proximity to neighbouring Costa Rica protected areas, and as part of the Mesoamerican Biological Corridor, guarantee an adequate area for preserving genetic diversity, free mobility of species, breeding and maintenance of major species such as the jaguar or american tiger (Felis onca), the tapir (Tapirus biardii) and the red and green parrot (Psittacideae).

Major ecosystem type	Tropical humid forest and wetlands areas
Major habitats & land cover types	Tropical humid forest
Location	11 °29'0'' N - 84°21 '55''W
Area (hectares)	
Total	1,392,900
Core area(s)	357,800
Buffer zone(s)	520,500
Transition area(s) when given	514,600 ha

(...)

Last updated: 10/1/2007

Annex 46

NICARAGUA, MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES, "SPECIES UNDER THREAT OF EXTINCTION: INDIO MAÍZ AND BOSAWAS BIOSPHERE RESERVES", 2008

Gobierno de Reconciliación
y Unidad Nacional
El Pueblo, Presidente!

2008: Year of Citizen Power

Species under threat of Extinction

Indio Maíz and BOSAWAS Biosphere Reserves

MAMMALS

No.	Scientific Name	Common Name
1	Alouatta palliata	Black howler monkey
2	Ateles geoffroyi	Central American spider monkey
3	Bassaricyon gabbii	Olingo
4	Bassariscus sumichrasti	Central American cacomistle, ring-tailed cat
5	Bradipus variegatus	Brown-throated three-toed sloth
6	Cebus capucinus	White-throated capuchin
7	Choloepus hoffmanni	Hoffmann's two-toed sloth
8	Cyclopes didactylus	Pygmy or silky anteater
9	Eira barbara	Tayra
10	Gallictis vittata = Galictis allamandi	Greater grison
11	Herpailurus (Felis) yaguarondi	Jaguarundi
12	Leopardus (Felis) pardalis	Ocelot
13	Leopardus (Felis) tigrinus	Little spotted cat
14	Leopardus (Felis) wiedii	Margay
15	Lontra longicaudis = Lutra annectens	Neotropical river otter
16	Mustela frenata	Long-tailed weasel
17	Myrmecophaga tridactyla	Giant anteater
18	Pantera onca	Jaguar
19	Potos flavus	Kinkajou
20	Puma concolor	Mountain lion, cougar
21	Tapirus bairdii	Baird's tapir, C. Am. tapir
22	Trichechus manatus	West Indian manatee

BIRDS

No.	Scientific Name	Common Name
1	Accipiter bicolor	Bi-colored hawk
2	Accipiter superciliosus	Tiny hawk
3	Ajaia ajeja	Roseate spoonbill
4	Amazona albifrons	White-fronted parrot
5	Amazona auropalliata	Yellow-nape parrot
6	Amazona autumnalis	Red-lore parrot
7	Amazona farinosa	Mealy parrot
8	Ara ambigua	Great green macaw
9	Ara macao	Scarlet macaw
10	Aratinga canicularis	Orange-fronted parakeet
11	Aratinga finschi	Crimson-fronted parakeet
12	Aratinga holochlora	Green parakeet
13	Aratinga nana astec	Olive-throated parakeet
14	Aulacorhynchus prasinus	Emerald toucanet
15	Bolborhynchus lineola	Barred parakeet
16	Brotogeris jugularis	Orange-chinned parakeet
17	Busarellus nigricolis	Black-collared hawk
18	Buteo albicaudatus	White-tailed hawk
19	Buteo albonotatus	Zone-tailed hawk
20	Buteo jamaicensis	Red-tailed hawk
21	Buteo nitidus = Asturina plagiaia	Gray hawk
22	Buteo platypterus	Broad-winged hawk
23	Buteo swainsoni	Swainson's hawk
24	Buteogallus anthracinus	Common black hawk
25	Buteogallus urubitinga	Great black hawk
26	Chondrohierax uncinatus	Hook-billed kite
27	Circus cyaneus	Northern harrier
28	Crax rubra	Great curassow
29	Daptrius americanus	Red-throated caracara
30	Elanoides forficatus	American swallow-tailed kite
31	Elanus leucurus	White-tailed kite
32	Falco columbarius	Merlin
33	Falco deiroleucus	Orange-breasted falcon
34	Falco femoralis	Aplomado falcon
35	Falco peregrinus	Peregrine falcon
36	Falco rufigularis	Bat falcon
37	Harpia harpyja	Harpy eagle
38	Harpyhaliaetus solitarius	Solitary eagle
39	Pionus senilis	White-crowned parrot
40	Pteroglossus torquatus	Collared aracari
41	Ramphastos sulfuratus	Keel-billed toucan
42	Ramphastos swaisonli	Chestnut-mandibled toucan
43	Rosthramus sociabilis	Snail kite
44	Sarcorhampus papa	King vulture
45	Selenidera spectabilis	Yellow-eared toucanet

REPTILES

No.	Scientific Name	Common Name
1	Corallus annulatus	Annulated tree boa, ringed tree boa
2	Corallus enydris	Amazon tree boa
3	Crocodylus acutus	American crocodile

*FISH

No.	Scientific Name	Common Name
1	Carcharhinus leucas	Bull shark
2	Pristis pectinatus	Small-tooth sawfish, common sawfish
3	Pristis perotteti	Large-tooth sawfish
4	Megalops spp.	Tarpon

* Indio Maíz Biosphere Reserve

Annex 47

MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES,
"STRATEGIC PROGRAM 2008: BIOSPHERE RESERVE
OF SOUTHEAST NICARAGUA"
SOURCE: HTTP://WWW.MARENA.GOB.NI/INDEX.PHP?OPTION=
COM_REMOSITORY&ITEMID=181& FUNC=FILEINFO&ID=523

Strategic Program 2008
Biosphere Reserve of Southeast Nicaragua

The **Nucleus Zones** for long-term conservation are located in the Indio Maíz Biological Reserve, Los Guatuzos Wetlands and Yolaina Mountains.

- The **Indio Maíz Biological Reserve** covers most of the municipality of San Juan de Nicaragua, part of the municipality of El Castillo and of the area of Bluefields municipality. It covers 3,157 square kilometers of tropical rainforest, continental wetlands, mangroves, estuaries and marshes. The extraction of any type of natural resource and any temporary or permanent settlement by human populations are prohibited.

- Covering an area of 106 square kilometers within the municipality of San Carlos, **Los Guatuzos Wetlands** are part of Los Guatuzos Wildlife Refuge. This area is formed by flood plains in which herbaceous vegetation and some palms are predominant. Because of the wetland characteristics, this zone is uninhabitable.

- With an area of 164 square kilometers, the **Yolaina Mountains** are part of the Cerro Silva Natural Reserve in the municipality of Bluefields. The Kubra, Torsuani, Mahogany and Montecristo rivers originate in the highlands of this area, which is dominated by tropical rainforest. The indigenous Rama consider more than half of this zone as their territory, where the population obtains most of the goods and services for its survival.

Dedicated to sustainable development, the **Buffer Zone** is divided according to its characteristics into a Land Area, Marine / Coastal Area and River Area:

- The Land Area covers the central part of the Biosphere Reserve and includes parts of the municipalities of Bluefields, Nueva Guinea, el Rama, El Castillo and San Carlos.

- The Marine / Coastal Area includes a strip of Caribbean Sea that is three nautical miles wide, extending from the border with Costa Rica to Bluefields Bay and containing marine, estuary, coastal, reef, marsh and mangrove ecosystems. This is a living space for Rama, Garífona and Mestizo communities in the region.

- The River Area fully covers the San Juan River Wildlife Refuge. It is a plain with deltas, low river dikes, swamps and sand bars that, due to the high precipitation, remain saturated with water.

The **Transition Zone** covers an area of 5,146 square kilometers and hosts a population of 160,000. It includes the municipalities of Morrito, San Miguelito, El Almendro, Nueva Guinea and El Rama. The zone has little forest coverage but rather is dominated by pastureland, basic grain cropland and some remnants of forest that lack timber of any significant commercial value.

In the administration of these areas, the objective is to strengthen municipal government capacities to control local-level investment processes. It includes the promotion of and support for the preparation of strategic municipal development plans and land use plans in each of the municipalities.

Annex 48

ARMY OF NICARAGUA, "ACTION PLAN FOR ISSUANCE OF DEPARTURE CLEARANCE CERTIFICATES IN THE SAN JUAN RIVER", 5 JULY 2001

ARMY OF NICARAGUA
Headquarters

Managua, July 5, 2001
GDEMG0392-01

COMMANDER-IN-CHIEF OF THE NAVAL FORCE
CHIEF OF THE SOUTHERN MILITARY DETACHMENT

Fellow Chiefs:

As per instructions from the Commander-in-Chief, Major General **Omar Halleslevens Acevedo,** you are hereby advised to comply with the attached Action Plan for Issuance of Departure Clearance Certificates in the San Juan River.

Having nothing more in this respect, I salute you.

Sincerely,

Assistant to the Commander-in-Chief

(Signed)
RUBY SAAVEDRA CÁRCAMO
Major

[Seal:] ARMY OF NICARAGUA
ASSISTANT TO THE
COMMANDER-IN-CHIEF
CENTRAL AMERICA

ACTION PLAN FOR ISSUANCE OF DEPARTURE CLEARANCE CERTIFICATES IN THE SAN JUAN RIVER

1. Vessels navigating in between the Military Control Posts over the San Juan River shall be issued a courtesy departure clearance certificate.

2. The vessels and Nicaraguans whose domicile is close to the bank of the San Juan River and Costa Ricans whose domicile is located in the adjacent proximities shall be issued a courtesy departure clearance certificate, which shall be valid for one month and must be renewed one day before the expiration date. These shall report to the Military Control Posts located along the San Juan River.

3. The Port Captaincy in San Juan del Norte is hereby authorized to issue international departure clearance certificates to tourist vessels at a cost of US$ 10.00 (ten dollars). These certificates may be issued by the Military Control Posts in Boca de Sarapiqui and El Delta only where vessels attempt to evade the Port Captaincy.

4. Departure clearance certificates by the Port Captaincy in San Carlos shall be issued as is customary.

5. Costa Rican vessels domiciled inland in Costa Rican territory that use the San Juan River as a transit route shall be issued an international departure clearance certificate in San Juan del Norte, subject to a symbolic fee equivalent to US$ 5.00 (five dollars).

6. All vessels navigating over the San Juan River shall fly the flag of the Republic of Nicaragua. If vessels have no flagpole, they shall fly the flag in the stern turret, if they have one.

7. As a measure for protecting human life and safe navigation, navigation over the San Juan River remains suspended between 5PM and 5AM.

8. National vessels must display their name and identification number as required by the Water Transportation Directorate of the Ministry of Transportation and Infrastructure.

9. The Chiefs of the Naval Force and the Southern Military Detachment [shall] organize training seminars for the personnel located in the Port Captaincies of San Juan del Norte, San Carlos and in the Border Posts along the San Juan River.

Annex 49

COSTA RICA, "BASIS FOR THE FORMATION OF A COMPANY, NAMED THE SARAPIQUÍ COMPANY. . .", 27 OCTOBER 1851

SOURCE: *REPLY TO THE ARGUMENT OF NICARAGUA*
ON THE QUESTION OF THE VALIDITY OR NULLITY
OF THE TREATY OF LIMITS OF APRIL 15, 1858,
TO BE DECIDED BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA AS ARBITRATOR, WASHINGTON:
GIBSON BROS., 1887. DOCUMENT NO. 26,
PP. 144-146

(-144-)

No. 26

Bases for the formation of a Company, named the Sarapiqui Company, for the opening of a road from San Jose to the Sarapiqui river, and for the navigation of the said river, in order that the exportations of Costa Rica may be made through the San Juan river.

JUAN RAFAEL MORA, President of the Republic of Costa Rica :

Taking into consideration :

1st, that the prosperity of the country being based upon agriculture and commerce, it is of the highest importance to improve those two great fountains of wealth in order that they may improve day by day and reach perfection.

2d. That one of the best means of reaching the end indicated is to lay out convenient and short roads leading to the ports on both oceans.

3d. That at present the Republic owns a very good road on the Pacific that can be improved; and that there is none on the side of the Atlantic, although such a one has been demanded for a long time by the urgent interest of the Costa Rican people.

4th. That several schemes, surveys, and examinations have been undertaken FOR THE LAST 30 YEARS AT DIFFERENT TIMES by several citizens of the nation in order to accomplish such a desired purpose.

5th. That subsequently to the said attempts the discovery was made of the means of building a road giving easy access to the SARAPIQUI RIVER, WHICH IS NAVIGABLE, AND EMPTIES INTO THE SAN JUAN RIVER, WHIOH IN ITS TURN EMPTIES INTO THE NORTHERN SEA, where there is a good port known and frequented by all commercial nations.

6th. That the Government, yielding to the general clamor, and taking advantage of that discovery, gave the proper authority, for a formal survey, and for the BUILDING OF THE ROAD, and appropriated for that purpose a portion of the revenue de-

(-145-)

voted to roads; and that the said formal survey proved to be successful, and also

that the work began, but could not be completed, for want of means.

7th. That if the necessity of such an easy way of communication to the Atlantic has heretofore been imperious, now it is still more urgent, owing to the increase of the population and industry of the country, as shown by statistics.

8th. And, finally, that the frequency of relations of this country with foreign States, is conducive to immense benefit for its wealth and civilization, and anticipates a great and flattering future for the Republic, I have been pleased to decree, and do hereby decree, as follows:

Article I. Due authority is given for the organization in this country of a Costa Rican Company, to be known as the Sarapiquí Company, consisting of twenty responsible members, and having a capital of $80,000, divided into shares of $3,000 for each partner ; the said capital to be increased hereafter, if necessary.

Article II. This company shall have for its object the building of a substantial carriage road, within the period of five years, to be counted from January 1, 1852, starting from this city, and ending on the wharf of the Sarapiquí river. The width of this road shall be 40 yards, whenever the topographic conditions of the locality permits it ; and it shall be provided with such bridges and other appurtenances as are necessary for its use and preservation.

Article III. Notwithstanding the provisions of the preceding Article, the company shall begin by building, as soon as possible, a good road for mules, which shall be finished within eighteen months, to be counted from the same day, January 1, 1852.

Article IX. It is hereby granted in favor of the said Company that it shall collect during the period of twenty-five years toll tax of two reals (25 cents) for each one hundred weight of all domestic merchandise that may be carried over the whole of the said road, or a part thereof, and four reals

(50 cents) for each one hundredweight of foreign merchandise, of whatever nature, imported through it.

Article XVIII. The Company shall have the right for the period of five years of establishing, if suitable to its interests, STEAM NAVIGATION ON THE SARAPIQUÍ RIVER, either by itself or by agreement with other companies; and, in either event, the Government grants to it, for the whole period of the contract for the road, the right to collect a navigation duty of one real (12 ½ cents) on each one hundredweight of merchandise exported, and two reals (25 cents) for each one hundredweight of merchandise imported,

Given at the National Palace, at San Jose, on October 27, 1851.

JUAN RAFAEL MORA.

JOAQUIN BERNARDO CALVO,
Secretary of the Interior.

Annex 50

COSTA RICA, DECREE NO. 14 OF 1860, DECREE CLOSING THE MOIN AND SARAPIQUÍ PORTS

N. 14.

The Senate and House of Representatives of Costa Rica, assembled in Congress,

DECREE

Art. 1. The port of Moin and the Sarapiquí River are closed to domestic trade in the Republic.

Art. 2. Customs at both points are abolished, as well as fiscal and military staff established thereat.

Art. 3. The Executive Branch shall create and organize the necessary police posts for preventing contraband through those routes.

Art. 4. The Executive Branch shall provide with respect to the political regime of Moin as it may deem proper.

To the House of Representatives.

Done at the Sessions Hall, San Jose, on the ninth of July of one thousand eighteen hundred and sixty. Manuel José Carazo, President. J. S. Ramírez, Secretary. Francisco Montealegre, Secretary.

Pass to the Executive Branch

House of Representatives. San Jose, nineteenth of July of one thousand eight hundred and sixty. Julian Volio, President. Demetrio Iglesias, Secretary. Andrés Sáenz, Secretary.

National Palace. San Jose, twenty-fourth of July of one thousand eighteen hundred and sixty.

Execute.

JOSE MARÍA MONTEALEGRE

Secretary of State at the
Ministry of Finance

VICENTE AGUILAR

Annex 51

NICARAGUA, AGREEMENT NO. 5, ACCESSION AND RATIFICATION OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, 23 APRIL 1977, *LA GACETA*, NO. 183, 184, 185 AND 186, 15, 16, 17 AND 18 AUGUST 1977

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

Agreement No. 5 dated 23 April 1977

Published in the Official Journal La Gaceta No. 183, 184, 185 and 186 of 15, 16, 17 and 18 August 1977

ANASTASIO SOMOZA DEBAYLE,

President of the Republic of Nicaragua,

Whereas:

The CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA was approved at the Plenipotentiary Conference held in Washington from 12 February to 2 March 1973.

Whereas:

On the twenty-third of April of one thousand nine hundred seventy-seven, the following Agreement was issued:

"No. 5

THE PRESIDENT OF THE REPUBLIC

Resolves:

First: To adhere to the Convention on International Trade in Endangered Species of Wild Fauna and Flora approved at the Plenipotentiary Conference held in Washington from February 12th to March 2nd of 1973.

Second: To submit the aforesaid Convention to the Honorable National Congress for approval.

Communicate: Presidential Office, Managua, National District, twenty-third day of April of one thousand nine hundred seventy-seven. **A. SOMOZA**. Minister of State at the Department of Foreign Affairs, **Alejandro Montiel Argüello".**

Whereas:

On the eleventh of June of one thousand nineteen hundred seventy-seven, the following law was issued:

THE PRESIDENT OF THE REPUBLIC

Makes Known
To its Inhabitants:

That the National Congress has ordered the following:

"Resolution No. 47

House of Representatives and Senate of the Republic of Nicaragua

Resolve:

Only: To approve the "Convention on International Trade in Endangered Species of Wild Fauna and Flora " approved at the Plenipotentiary Conference held in Washington on February 12th to March 2nd of 1973, to which the Government of the Republic of Nicaragua has adhered through Executive Order No. 5 of 23 April 1977.

This Resolution shall be published in the Official Journal "La Gaceta".

Done at the Sessions Hall of the House of Representatives, Managua, N. D., seventeenth of May of one thousand nine hundred seventy-seven. **Luis H. Pallais Debayle**, President. **María Helena de Porras**, Secretary. **Fernando Zelaya Rojas**, Secretary.

To the Executive Branch. The Senate. Managua, N. D., June 8, 1977.**A. SOMOZA**. **Harry Bodán Shields**, Minister of State at the Department of Foreign Affairs by Law."

Whereas:

On the twenty-second of June of one thousand nine hundred seventy-seven the following Decree was issued:

"No. 7

THE PRESIDENT OF THE REPUBLIC

Decrees:

First: To ratify the Convention on International Trade in Endangered Species of Wild Fauna and Flora approved by the Plenipotentiary Conference held in Washington on February 12th to March 2nd of 1973.

Second: To issue the respective Instrument of Ratification to be deposited with the Government of the Swiss Confederation.

Communicate: Presidential Office. Managua, National District, 22 June 1977. **A. SOMOZA**. Minister of State at the Department of Foreign Affairs by Law, **Harry Bodán Shields**".

Whereas:

I have hereunto signed and affixed the Great National Seal on this Instrument of Adhesion, and it has been countersigned by the Minister of State at the Department of Foreign Affairs for deposit with the Government of the Swiss Confederation.

Done at the Office of the President, Managua, National District, on the twenty-ninth of June of one thousand nine hundred seventy-seven. (s) **A. SOMOZA** (L.G.S.N.). **Harry Bodán Shields.** Minister of State at the Department of Foreign Affairs by Law.

Annex 52

NICARAGUA, DECREE NO. 161, LAW CREATING THE NICARAGUAN TOURISM INSTITUTE, 14 NOVEMBER 1979, *LA GACETA*, NO. 62, 20 NOVEMBER 1979

Legal Rules of Nicaragua

Matter: Decree-Law
Title: Law Creating the Nicaraguan Tourism Institute
Date of Publication: 11/20/79
Gazette No.: 62
Text of the Rule:

LAW CREATING THE NICARAGUAN TOURISM INSTITUTE

DECREE NO. 161, approved on 14 November 1979

Published in La Gaceta No. 62 of 20 November 1979

THE BOARD OF GOVERNMENT OF NATIONAL RECONSTRUCTION OF THE REPUBLIC OF NICARAGUA

Exercising its powers,

Decrees:

The following:

LAW CREATING THE NICARAGUAN TOURISM INSTITUTE

...

Chapter II

...

Objectives and Attributions

Article 10. The Tourism Card is hereby created to cover the entry to the country of tourists over twelve years of age. Children under twelve years of age may be included in the same tourism card of their parents, tutors or custodians.

...

Chapter VI

Tourists

...

Article 25. Tourists must obtain special tourism cards or tourist visas to enter the national territory. Tourism cards shall be subject to the payment of two Central American pesos or its equivalent in cordobas.

The issuance, format and use of these cards shall be regulated by the Executive Branch through the Ministry of Governance, upon consulting the Nicaraguan Tourism Institute, with the objective of increasing tourism in the Republic, while preventing the entry of undesirable elements into the country.

Article 26. Tourism cards shall be valid for thirty days, extendable to ninety days, upon prior authorization from the National Immigration and Naturalization Directorate.

...

Chapter IX
Final Provisions

...

Article 39. The present Decree shall enter into force from the date of publication in any mass media, notwithstanding its subsequent publication in the Official Journal.

Done at Managua City on the fourteenth of November of one thousand nine hundred and seventy-nine. "National Liberation Year."

BOARD OF GOVERNMENT OF NATIONAL RECONSTRUCTION. Violeta B. de Chamorro. Sergio Ramírez M. Daniel Ortega S. Alfonso Robelo C. Moises Hassan M.

Annex 53

NICARAGUA, REGISTER NO. 3743-R/F 791975, REGULATIONS ON THE ISSUANCE, FORMAT AND USE OF SPECIAL TOURISM CARDS, 25 MAY 1993

REGULATIONS ON THE ISSUANCE, FORMAT AND USE OF SPECIAL TOURISM CARDS

Register No. 3743 – R/F 791975 Value C$ 135.00
The Ministry of Governance of the Republic of Nicaragua:

Considering the powers conferred by decree No. 21-19, published in the Official Journal ("La Gaceta") No. 100 on the third of April of one thousand nine hundred and ninety-one, the following Regulation regarding the issuance, format and use of the Special Tourism Card is hereby issued.

Art. 1. The purpose of these Regulations is to regulate the issuance, forms and use of the Special Tourism Card, hereinafter referred to as "The Card" for purposes of brevity.

Art. 2. Tourists who require a consular visa to enter the national territory may purchase a Special Tourism Card upon arrival.

Art. 3. The Ministry of Tourism shall be the Official Nicaraguan Government Agency that will issue "The Card" according to the following format, printed on an original and two copies with the following characteristics:

1. Name and number of "The Card"
2. Coat of arms of the Republic of Nicaragua
3. Date of issue
4. First names and surnames of cardholder
5. Sex: F ( ) M ( )
6. Country and date of birth
7. Nationality
8. Passport No.
9. Occupation
10. Address in Nicaragua
11. Address abroad
12. Point of Entry
13. Point of Exit
14. Length of stay
15. Signature and seal of the agency
16. Signature of tourist

"The Card" shall contain a blank square space for official use by Immigration and Naturalization authorities for any pertinent observations.

Art. 4. Persons older than twelve (12) years old may use "The Card". Use of "The Card" is restricted for children under twelve (12) years old, unless accompanied by their parents or tutors, in which case a brief note of cross-reference shall be made in the respective Cards.

Art. 5. "The Card" is a document that substitutes the respective visa, but does not substitute in any case the presentation of the Cardholder's passport, which must be valid for no less than six (6) months, nor does it exclude the filling out of the respective Immigration Control Card by the Cardholder.

Art. 6. "The Card" may be issued overseas by the respective Nicaraguan consulates, airlines, travel agencies and tour operators, or by any other tourism service company authorized by the Ministry of Tourism. The issuer shall sign and stamp "The Card" to be used.

Art. 7. "The Card" shall be mandatory for nationals from countries with which Nicaragua has signed a Visa Exemption Agreement.

Art. 8. The use of "The Card" by nationals from countries to which Nicaragua applies immigration and visa restrictions shall not be valid.

Art. 9. "The Card" is a document for personal use, non-transferable and valid for one trip.

Art. 10. "The Card" shall be valid for thirty (30) days from the date of issue. Upon expiration, meaning that once it expires no foreigner may enter the national territory.

Art. 11. "The Card" shall be valid for a stay of thirty (30) days in the country from the date of entry of the foreigner to the national territory and may not be extended.

Art. 12. Tourists entering the country with "The Card" must present it when they leave Nicaragua.

Art. 13. In case of loss, theft or destruction of "The Card" after entering the country, tourists must personally report said loss or theft to the Immigration and Naturalization authorities in order to legalize their stay in the country.

Art. 14. Any violations by natural or legal persons shall be punished in accordance with the relevant laws.

Art. 15. This Regulation shall enter into force from the date of publication in the Official Journal "La Gaceta".

Concluded in the city of Managua, on the twenty-fifth of May of one thousand nine hundred and ninety-three.

Violeta Barrios de Chamorro – President of Nicaragua
Alfredo Mendieta Artola – Minister of Governance

Annex 54

POLITICAL CONSTITUTION OF THE REPUBLIC OF NICARAGUA OF 1987 AND ITS REFORMS, ARTICLES 92 AND 130

POLITICAL CONSTITUTION OF NICARAGUA

(...)

ARTICLE 92. [Army of Nicaragua]

The Army of Nicaragua is the armed institution for the defence of sovereignty, independence and territorial integrity.

Only in exceptional cases, the President of the Republic, in the Council of Ministers, in support of the National Police, may order the intervention of the Nicaraguan Army when the stability of the Republic is threatened by great internal disorders, calamities or natural disasters.

The establishment of foreign military bases in the national territory is prohibited. The transit or stationing of foreign military ships, aircraft and machinery may be authorized for humanitarian purposes, always provided that such authorization is requested by the Government of the Republic and ratified by the National Assembly.

**Article amended by Law N° 192 of 1995.*

Article 130. [Social State of Law. Principle of legality and probity. Immunity]

The Nicaraguan nation is constituted in a Social State of Law. No appointment grants, to that who exercises it, additional functions than those conferred to by the Constitution and the laws.

All government officials from the State must provide an accounting of his or her assets before assuming a position and after the term is completed. The law regulates this matter.

(...)

Annex 55

NICARAGUA, LAW NO. 495, GENERAL TOURISM LAW, 2 JULY 2004, *LA GACETA*, NO. 184, 22 SEPTEMBER 2004

Legal Rules of Nicaragua

Matter: Tourism
Status: Laws

GENERAL TOURISM LAW

LAW No. 495, Approved on July 2, 2004

Published in La Gaceta No. 184 on September 22, 2004

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

Makes known to the people of Nicaragua that

THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NICARAGUA

Exercising its powers,

HAS ISSUED

The following:

GENERAL TOURISM LAW

...

Chapter III
Structure and Functioning of INTUR

...

Section 2

Patrimony, Financial Regime and Income of INTUR

Article 21. Notwithstanding provisions of Chapter IX of Law No. 298 creating the Nicaraguan Tourism Institute, the patrimony and income of INTUR shall comprise the following:

a) Allocations specified in the General Budget of the Republic exclusively for the integral development of tourism.

b) Tariffs collected for the issuance and annual renewal of the Title/ License paid by tourism service operators.

c) Tariffs collected on property concessions by the State to establish/install services.

d) Fines collected in accordance with the present Law and its Regulation.

e) The amount of five dollars (US$5.00), legal tender of the United States of America, or its equivalent in local currency, at the official exchange rate in force on the date of payment on account of Tourism Cards. Nationals from countries with which Nicaragua has signed Visa Exemption Agreements are excluded.

f) The amount of five dollars (US$5.00), legal tender of the United States of America, or its equivalent in local currency, at the official exchange rate on the date of payment for each vehicle that enters the country through any border post within the national territory.

g) The amount of ten dollars (US$10.00), legal tender of the United States of America, or its equivalent in local currency, at the official exchange rate in force on the date of payment for each microbus that enters the country through any border post within the national territory.

h) The amount of fifteen dollars (US$15.00), legal tender of the United States of America, or its equivalent in local currency, at the official exchange rate in force on the date of payment for each bus that enters the country through any border post within the national territory.

i) The amount of three dollars (US$3.00), legal tender of the United States of America, or its equivalent in local currency, at the official exchange rate in force on the date of payment for each passenger that leaves the country through any border post within the national territory, except through the national airport, for which US$32.00 shall be paid in airport taxes.

Airline, ship and international tourism bus crews, diplomats, nationals from CA-4 countries and holders of diplomatic passports, national or foreign, are exempted from the payment or amounts set forth in subparagraphs f), g) and h).

j) Four percent (4%) of total invoicing of tourism service providers, originating from the 15% VAT collected from this sector. This percentage may be revised each year on the basis of the levels of collection and needs of INTUR.

k) Five percent (5%) of total invoicing of airline tickets for any class of international travel, and those originating in Nicaragua that are sold abroad, originating from the 15% VAT collected in accordance with the pertinent law. Subparagraphs j) and k) shall be applicable six (6) months after the present Law takes effect. The Ministry of Finance and Public Credit, in coordination with the General Income Tax Directorate and the Nicaraguan Tourism Institute, shall develop the necessary mechanisms of coordination to optimize tax collection and direct the resources established in this article. INTUR shall submit an income and expense statement each year in the month of September.

...

Final Provisions

...

Article 98. The present Law shall enter into force from the date of publication in the Official Journal La Gaceta.

Done at the Sessions Hall of the National Assembly in the city of Managua on the second of July of two thousand and four. **CARLOS NOGUERA PASTORA**, President of the National Assembly. **MIGUEL LOPEZ BALDIZON**, First Secretary of the National Assembly.

Therefore: Be it enacted as a law of the Republic. Be it published and executed. Managua, seventeenth of September of two thousand and four. **ENRIQUE BOLAÑOS GEYER**, President of the Republic of Nicaragua.

Annex 56

NICARAGUA, PRESIDENTIAL DECREE NO. 57-2005, 31 AUGUST 2005

Decree No. 57-2005

The President of the Republic of Nicaragua

Exercising the powers conferred upon him by the Political Constitution

HAS ISSUED

The following

DECREE

Art. 1 For the purposes of visa exemption and mandatory visas, three categories are established in accordance with the origin and nature of the travel document:

Category "A" – Exempted from the visa requirement
Category "B" – Consular visa or no consultation required and
Category "C" – Consulted visa

Art. 2 Nationals from the following countries, comprising Category "A", holding any type of passport, shall not require a visa to enter the national territory:

Country
Germany
Andorra
Antigua and Barbuda
Argentina
Australia
Austria
Bahamas
Bahrain
United States of America
Estonia
Finland
France
Greece
Hungary
Ireland

Country
Barbados
Belgium
Belize
Brazil
Brunei-Darussalam
Bulgaria
Canada
Chile
Macedonia
Madagascar
Malaysia
Malta
Mexico
Monaco
Norway

Country
Cyprus
Republic of South Korea
Costa Rica
Croatia
Denmark
Slovakia
Slovenia
Spain
San Marino
St. Vincent and Grenadines
Saint Lucia
Holy See (Vatican City)
St. Thomas and Prince Islands
Singapore
South Africa

Iceland
Israel
Italy
Marshall Islands
Solomon Islands
Japan
Kuwait
Letonia (Latvia)
Lichtenstein
Lithuania
Luxemburg

New Zealand
Panama
Paraguay
Poland
Portugal
Qatar
The Netherlands (Holland)
United Kingdom of Great Britain and Northern Ireland
Special Administrative Regions of the People's Republic of China
Hong Kong. Those originating from other British territories shall not require a visa. (A)
Czech Republic
Romania
St. Kitts & Nevis

Sweden
Switzerland
Trinidad and Tobago
Turkey
Tuvalu
Taiwanese Republic of China
Uruguay
Vanuatu
Venezuela
International Organizations (OAS, UN, European Commission)

Art. 3 Nationals from the following countries, comprising Category "B" according to type of passport, shall require a consular visa to enter the national territory:

Country	ORDINARY PASSPORT	DIPLOMATIC, OFFICIAL AND SERVICE PASSPORT
Saudi Arabia	Consular visa or no consultation required	Consular visa or no consultation required
Azerbaijan	Consular visa or no consultation required	Consular visa or no consultation required
Relarus, Republic of	Consular visa or no consultation required	Visa exempted
Benin	Consular visa or no consultation required	Consular visa or no consultation required
Bhutan	Consular visa or no consultation required	Consular visa or no consultation required
Bolivia	Consular visa or no	Visa exempted

	consultation required	
Burkina Faso	Consular visa or no consultation required	Consular visa or no consultation required
Burundi, Republic of	Consular visa or no consultation required	Consular visa or no consultation required
Cape Verde	Consular visa or no consultation required	Consular visa or no consultation required
Cambodia	Consular visa or no consultation required	Consular visa or no consultation required
Cameroon	Consular visa or no consultation required	Consular visa or no consultation required
Chad	Consular visa or no consultation required	Consular visa or no consultation required
Colombia	Consular visa or no consultation required	Visa exempted
Comoros	Consular visa or no consultation required	Consular visa or no consultation required
Ivory Coast	Consular visa or no consultation required	Consular visa or no consultation required
Djibouti	Consular visa or no consultation required	Consular visa or no consultation required
Dominica	Consular visa or no consultation required	Visa exempted
Ecuador	Consular visa or no consultation required	Visa exempted
Egypt, Arab Republic of	Consular visa or no consultation required	Visa exempted
United Arab Emirates	Consular visa or no consultation required	Consular visa or no consultation required
Fiji	Consular visa or no consultation required	Consular visa or no consultation required
Philippines	Consular visa or no consultation required	Consular visa or no consultation required
Gabon	Consular visa or no consultation required	Visa exempted
Gambia	Consular visa or no consultation required	Consular visa or no consultation required
Georgia	Consular visa or no consultation required	Consular visa or no consultation required
Granada	Consular visa or no consultation required	Visa exempted
Guinea	Consular visa or no	Consular visa or no consultation

	consultation required	required
Guinea-Bissau	Consular visa or no consultation required	Consular visa or no consultation required
Equatorial Guinea	Consular visa or no consultation required	Consular visa or no consultation required
Guyana	Consular visa or no consultation required	Visa exempted
Jamaica	Consular visa or no consultation required	Visa exempted
Kazakhstan	Consular visa or no consultation required	Consular visa or no consultation required
Kenya	Consular visa or no consultation required	Visa exempted
Kyrgyzstan	Consular visa or no consultation required	Consular visa or no consultation required
Kiribati	Consular visa or no consultation required	Consular visa or no consultation required
Lesotho	Consular visa or no consultation required	Consular visa or no consultation required
Malawi	Consular visa or no consultation required	Consular visa or no consultation required
Maldives	Consular visa or no consultation required	Consular visa or no consultation required
Morocco, Kingdom of	Consular visa or no consultation required	Visa exempted
Mauritius	Consular visa or no consultation required	Consular visa or no consultation required
Mauritania	Consular visa or no consultation required	Consular visa or no consultation required
Micronesia (Federal States)	Consular visa or no consultation required	Consular visa or no consultation required
Moldova, Republic of (Moldova)	Consular visa or no consultation required	Consular visa or no consultation required
Myanmar, Union of	Consular visa or no consultation required	Consular visa or no consultation required
Namibia	Consular visa or no consultation required	Consular visa or no consultation required
Nauru	Consular visa or no consultation required	Consular visa or no consultation required
Niger	Consular visa or no consultation required	Consular visa or no consultation required

Palau	Consular visa or no consultation required	Consular visa or no consultation required.
Papau New Guinea	Consular visa or no consultation required	Visa exempted
Peru	Consular visa or no consultation required	Visa exempted
Central African Republic	Consular visa or no consultation required	Consular visa or no consultation required
Dominican Republic	Consular visa or no consultation required	Visa exempted
Rwanda	Consular visa or no consultation required	Consular visa or no consultation required
Russian Federation	Consular visa or no consultation required	Visa exempted
Samoa	Consular visa or no consultation required	Consular visa or no consultation required
Senegal	Consular visa or no consultation required	Consular visa or no consultation required
Country	**ORDINARY PASSPORT**	**DIPLOMATIC, OFFICIAL AND SERVICE PASSPORT**
Serbia and Montenegro (formerly Federative Republic of Yugoslavia)	Consular visa or no consultation required	Visa exempted
Seychelles	Consular visa or no consultation required	Consular visa or no consultation required
Suriname	Consular visa or no consultation required	Visa exempted
Swaziland	Consular visa or no consultation required	Consular visa or no consultation required
Thailand	Consular visa or no consultation required	Consular visa or no consultation required
Tanzania, United Republic of	Consular visa or no consultation required	Consular visa or no consultation required
Tajikistan	Consular visa or no consultation required	Consular visa or no consultation required
Togo	Consular visa or no consultation required	Consular visa or no consultation required

Tonga	Consular visa or no consultation required	Consular visa or no consultation required
Tunisia	Consular visa or no consultation required	Consular visa or no consultation required
Turkmenistan	Consular visa or no consultation required	Consular visa or no consultation required
Ukraine	Consular visa or no consultation required	Visa exempted
Uganda	Consular visa or no consultation required	Consular visa or no consultation required
Uzbekistan	Consular visa or no consultation required	Consular visa or no consultation required
Zambia	Consular visa or no consultation required	Consular visa or no consultation required
Zimbabwe	Consular visa or no consultation required	Consular visa or no consultation required

Art. 4 Nationals from the following countries, comprising Category "C" according to type of passport, shall require a consulted visa to enter the national territory:

COUNTRY	ORDINARY PASSPORT	DIPLOMATIC, OFFICIAL AND SERVICE PASSPORT
Afghanistan, Islamic State	Consulted visa	Consulted visa
Albania	Consulted visa	Consulted visa
Angola, Republic of	Consulted visa	Consulted visa
Algeria	Consulted visa	Consulted visa
Armenia	Consulted visa	Consulted visa
Eritrea	Consulted visa	Consulted visa
Bangladesh, People's Republic of	Consulted visa	Consulted visa
Bosnia and Herzegovina, Republic of	Consulted visa	Consulted visa
Botswana	Consulted visa	Consulted visa
China, People's Republic of	Consulted visa	Consulted visa
Congo	Consulted visa	Consulted visa
Congo, Democratic Republic of	Consulted visa	Consulted visa
Korea, People's Democratic Republic of	Consulted visa	Consulted visa

(North Korea)		
Cuba	Consulted visa	Visa exempted
Ethiopia	Consulted visa	Consulted visa
Ghana	Consulted visa	Consulted visa
Haiti	Consulted visa	Consular visa or no consultation required
India	Consulted visa	Consular visa or no consultation required
Indonesia	Consulted visa	Consular visa or no consultation required
Iraq, Republic of	Consulted visa	Consulted visa
Iran, Islamic Republic of	Consulted visa	Consulted visa
Jordan, Hashemite Kingdom of	Consulted visa	Consulted visa
Laos, Democratic People's Republic of	Consulted visa	Consulted visa
Lebanon	Consulted visa	Consulted visa
Liberia	Consulted visa	Consulted visa
Libya (Great Socialist People's Libyan Arab Jamahiriya)	Consulted visa	Consulted visa
Mali	Consulted visa	Consulted visa
Mongolia	Consulted visa	Consulted visa
Mozambique	Consulted visa	Consulted visa
Nepal	Consulted visa	Consulted visa
Nigeria, Federal Republic of	Consulted visa	Consulted visa
Oman	Consulted visa	Consulted visa
Pakistan, Islamic Republic of	Consulted visa	Consulted visa
Sierra Leone, Republic of	Consulted visa	Consulted visa
Syria, Arab Republic of	Consulted visa	Consulted visa
Somalia, Democratic Republic	Consulted visa	Consulted visa
Sri Lanka, Socialist Democratic Republic of	Consulted visa	Consulted visa
Sudan, Republic of	Consulted visa	Consulted visa
East Timor	Consulted visa	Consulted visa
Vietnam	Consulted visa	Consulted visa
Palestinian Authority, Carrying valid passport	Consulted visa	Consulted visa

or other travel document issued by the Palestinian Authority	
Entities or Territorial Authorities Not Recognized as States	**VALID PASSPORT OR OTHER TRAVEL DOCUMENT**
Saharawi Democratic Arab Republic	Consulted visa

Art. 5 Nationals from the countries mentioned in the foregoing article shall require a visa authorized by the Immigration and Naturalization General Directorate to enter the national territory after complying with the requirements established under the law.

Art. 6 Visa Exemption Agreements signed by the Republic of Nicaragua with other States shall remain in force, as well as those signed by the United Nations and the Organization of American States.

Art. 7 The Ministry of Foreign Affairs and the Ministry of Governance shall be responsible for the execution of this Decree through the Immigration and Naturalization General Directorate.

Art. 8 The present Decree repeals Decree No. 94-2001, published in the Official Journal La Gaceta No. 189 of 5 October 2001 and shall enter into force from the date of publication in the Official Journal La Gaceta.

Done in the city ofManagua, Presidential Office, on the thirty-first of August of two thousand and five.

ENRIQUE BOLAÑOS GEYER
PRESIDENT OF THE REPUBLIC

Julio Vega Pasquier
Minister of Governance

Annex 57

MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES MINISTERIAL RESOLUTION NO. 029-2006, INCLUDING THE ALMENDRO TREE *(DIPTERYX PANAMENSIS)* IN THE NICARAGUAN CLOSED SEASON SYSTEM OF WILD SPECIES IN THE LIST OF INDEFINITE NATIONAL CLOSED SEASONS, 16 JUNE 2006, *LA GACETA*, NO. 141, 21 JULY 2006

THE MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES

Reg. No. 10136 – M. 1855708 – Value C$215.00

MINISTERIAL RESOLUTION No. 029-2006

The Ministry of the Environment and Natural Resources:

WHEREAS

I

That it is the duty of the State and all its inhabitants to oversee the conservation and exploitation of national biological diversity and genetic materials.

II

That for compliance of this duty by the State, specifically for the purpose of safeguarding biological diversity, numeral 1 of Article 71 of Law 217, General Law of the Environment and Natural Resources; and Article 47 of Decree 9-96, Law 217 Regulation, grant competence to the Ministry of the Environment and Natural Resources to establish a System of Closed Seasons for the purpose of safeguarding and protecting Biological Diversity.

III

That the System of Closed Seasons should group and harmonize the set of principles and provisions of which it is composed, as well as environmental and climatic conditions, seasons and zones in which the cycles of reproduction and recruitment of the different populations occur, so as to allow for effective conservation and sustainable use of wildlife species and their habitats.

IV

That the closed season is the instrument restricting and regulating the use of a determined species in times and territories where there is evidence or indication that said species is being threatened by anthropogenic factors, such as hunting, capture or extraction in the natural environment, regardless of the intended purpose.

V

That the closed season system is an instrument that allows national citizens, institutions and organizations to participate in the protection, conservation and sustainable use of wildlife species, without any limitation other than the observation of the principles and provisions of which it is composed.

VI

That since 2001, intensive commercial activity has been carried out by timber merchants and exporters, mainly to export the wood of the almendro tree (*Dipteryx panamensis*), which has put strong pressure on this species given its high demand in neighbouring countries.

VII

That the almendro tree (*Dipteryx panamensis*) is under great pressure due to illegal trade in an inaccessible border zone, which favours this type of illegal activity.

VIII

That another factor threatening the survival of this species is felling, slashing and burning practices by settlers in agricultural and livestock activities, as well as migratory agriculture.

IX

That the almendro tree (*Dipteryx panamensis)* has great ecological value given that the almond fruit represents up to 80% of the food consumed by the great green macaw (*Ara ambigua*), a species listed as endangered in Appendix I of CITES, during the critical nesting season. Further, 90% of the nests of the great green macaw are located in the almendro trees, making it the main habitat for this singular species.

Therefore, in use of its powers

RESOLVES:

To include the almendro tree (*Dipteryx Panamensis*) in the Nicaraguan Closed Season System of Wild Species in the List of Indefinite National Closed Seasons.

Article 1. **Purpose.** The purpose of this Ministerial Resolution is to include the almendro tree (*Dipteryx Panamensis*) in the Nicaraguan Closed Season System of Wild Species in the List of Indefinite National Closed Seasons.

Article 2. **Scope of Application.** This ministerial resolution shall apply to all natural and legal persons, national and foreign, throughout the national territory.

Article 3. **Enforcing Authority.** The enforcing authority of this Ministerial Resolution is the Ministry of the Environment and Natural Resources, through its Territorial Delegations, in coordination with the respective Municipal Governments, the National Forestry Institute and other pertinent authorities.

Article 4. The present Resolution shall take effect on the date of publication in any newspaper of national circulation, notwithstanding its subsequent publication in the Official Journal Gazette.

Done at the city of Managua, Nicaragua, on the sixteenth day of June of two thousand and six. **Cristóbal (Tito) Sequeira,** Minister.

Annex 58

THE NEW POCKET DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES. LONDON, 1809 (EXTRACTS)

(-167-)

(...)

Comércio, *s.m.* Trade, commerce, traffic; communication, intercourse; exchange.

(...)

(-409-)

(...)

Trade, *n.* Trato, comercio, oficio.

(...)

Annex 59

ROYAL SPANISH ACADEMY DICTIONARIES OF THE 19TH CENTURY (EXTRACTS)

(A) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
FOURTH EDITION, MADRID, VIUDA DE IBARRA, 1803

(B) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
FIFTH EDITION, MADRID, IMPRENTA REAL, 1817

(C) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
SIXTH EDITION, MADRID, IMPRENTA NACIONAL, 1822

(D) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
SEVENTH EDITION, MADRID, IMPRENTA REAL, 1832

(E) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
EIGHTH EDITION, MADRID, IMPRENTA NACIONAL, 1837

(F) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
NINTH EDITION, MADRID, IMPRENTA
DE D. FRANCISCO MARÍA FERNÁNDEZ, 1843

(G) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
TENTH EDITION, MADRID, IMPRENTA NACIONAL, 1852

(H) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
ELEVENTH EDITION, MADRID, IMPRENTA
DE DON MANUEL RIVADENEYRA, 1869

(I) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
TWELFTH EDITION, MADRID, IMPRENTA
DE D. GREGORIO HERNANDO, 1884

(J) ROYAL SPANISH ACADEMY, *DICTIONARY OF THE CASTILIAN LANGUAGE*,
THIRTEENTH EDITION, MADRID, IMPRENTA DE LOS SRES.
HERNANDO Y COMPAÑÍA, 1899

a) Royal Spanish Academy, *Dictionary of the Castilian Language*. Fourth Edition. Madrid, Viuda de Ibarra, 1803.

(-210-)

(...)

COMERCIO, s. m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

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b) Royal Spanish Academy, *Dictionary of the Castilian Language*. Fifth Edition. Madrid, Imprenta Real, 1817.

(-216-)

(...)

COMERCIO, s. m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

---

c) Royal Spanish Academy, *Dictionary of the Castilian Language*. Sixth Edition. Madrid, Imprenta Nacional, 1822.

(-198-)

(...)

COMERCIO, s. m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

d) Royal Spanish Academy, *Dictionary of the Castilian Language*. Seventh Edition. Madrid, Imprenta Real, 1832.

(-181-)

(...)

COMERCIO, m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

---

e) Royal Spanish Academy, *Dictionary of the Castilian Language*. Eighth Edition. Madrid, Imprenta Nacional, 1837.

(-181-)

(...)

COMERCIO, m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

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f) Royal Spanish Academy, *Dictionary of the Castilian Language*. Ninth Edition. Madrid, Imprenta de D. Francisco María Fernández, 1843.

(-176-)

(...)

COMERCIO, m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

g) Royal Spanish Academy, *Dictionary of the Castilian Language*. Tenth Edition. Madrid, Imprenta Nacional, 1852.

(-170-)

(...)

COMERCIO, m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras. *Commercium, mercatura.*

(...)

---

h) Royal Spanish Academy, *Dictionary of the Castilian Language*. Eleventh Edition. Madrid, Imprenta de Don Manuel Rivadeneyra, 1869.

(-188-)

(...)

COMERCIO, m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras.

(...)

---

i) Royal Spanish Academy, *Dictionary of the Castilian Language*. Twelfth Edition. Madrid, Imprenta de D. Gregorio Hernando, 1884.

(-262-)

(...)

COMERCIO. (Del lat. *commercium*; de *cum*, con, y *merx*, mercancia.) m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras.

(...)

j) Royal Spanish Academy, *Dictionary of the Castilian Language*. Thirteenth Edition. Madrid, Imprenta de los Sres. Hernando y compañia, 1899.

(-244-)

(…)

COMERCIO. (Del lat. *commercium*; de *cum*, con, y *merx*, mercancia.) m. Negociacion y tráfico que se hace comprando, vendiendo, ó permutando unas cosas con otras.

(…)

Annex 60

LA CADENA, MARIANO VELAZQUEZ DE, *A DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES*, NEW YORK: D. APPLETON AND COMPANY, 1858 (EXTRACTS)

(-106-)

(…)

Comercio, am. Trade, commerce; commercial community; communication, intercourse; game at cards.

(…)

(-805-)

(…)

Trade, a. Comercio, tráfico; negocio, trato; ocupación, oficio, ejercicio.

(…)

Annex 61

PORTER, NOAH (ED.), *WEBSTER'S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE*, SPRINGFIELD, MA: G. & C. MERRIAM COMPANY, 1913 (EXTRACT)

(-58-)

(...)

Mer'chant-man (-man), n.; pl. **Merchantmen** ('men)

1. A merchant. [obs.] Matt.xiii.45.

2. A Trading vessel; a ship employed in the transportation of goods, as distinguished from a man-of-war.

Annex 62

ROYAL SPANISH ACADEMY. *DICTIONARY OF THE CASTILIAN LANGUAGE*, FOURTEENTH EDITION, MADRID: IMPRENTA DE LOS SUCESORES DE HERNANDO, 1914 (EXTRACT)

(...)

Buque. (Del germ. *buk*, vientre.) m. **Cabida**// 2 Mar. Casco de la nave.// 3 Mar. Barco con cubierta, que por su tamaño, solidez y fuerza es adecuado para navegaciones o empresas marítimas de importancia// a la carga, Mar. El que está en el puerto esperado cargamento.// **de cabotaje**. Mar. El que se dedica a esta especie de tráfico //**de cruz**. *Mar*. El que lleva velas cuadradas, cuyas vergas se cruzan en ángulo recto sobre los árboles o mástiles. // **de guerra**. *Mar*. El del Estado, construído y armado para usos militares. // **de hélice**. *Mar*. El de vapor, que se mueve por tal medio.// **de pozo**. *Mar*. El que no tiene cubierta sobre la de la batería.// **de ruedas**. *Mar*. El de vapor que a cada costado lleva la suya, o bien una sola en la popa//. **de torre**. *Mar*. El que lleva sobre cubierta una especia de torre o cilindro formado de plancha de hiero, para que desde dentro funcione un gran cañón giratorio o pueda el jefe, sin riesgo, mandar la maniobra.// **de transporte**. *Mar*. El del Estado, empleado en la conducción de hombres o efectos de guerra.// **de vapor**. *Mar*. El que se mueve a impulso de una máquina o más de esta especie, sea con ruedas o con hélice. // **de vela**. *Mar*. El que aprovecha con cualquier aparejo la fuerza del viento. // **en lastre**. *Mar*. El que navega sin carga útil. // **en rosca**. *Mar*. El que está acabado de construir, sin aparejo ni máquinas, y con solo al casco. // **mercante**. El de persona o empresa particular, y que se emplea en la conducción de mercancías. // **mixto**. *Mar*. El que utiliza la fuerza del viento y del vapor, ordinariamente con máquinas de hélice.// **submarino**. *Mar*. El de guerra que puede corearse herméticamente, sumergiese a voluntad con su tripulación y por medio de una maquina eléctrica, navegar dentro del agua para hacer reconocimientos en los buques enemigos y lanzarles torpedos.

(...)

Annex 63

LETTER FROM MR. NEIL JOHNSTONE, DIRECTOR OF LANGUAGE SERVICES AND DOCUMENTATION DIVISION OF THE WORLD TRADE ORGANIZATION, TO AMBASSADOR ALICIA MARTIN, PERMANENT REPRESENTATIVE OF THE REPUBLIC OF NICARAGUA TO THE OFFICE OF THE UNITED NATIONS, GENEVA, 12 OCTOBER 2006

World Trade Organization

Direct Line: (+41 22) 739 5228
Direct Fax: (+41 22) 739 5793
Email: Neil.Johnstone@wto.org

Her Excellency Mrs. Alicia Martin
Ambassador
Permanent Representative of the Republic of Nicaragua
to the Office of the United Nations
and other International Organizations in Geneva
Rue d Vermont 37-39
1202 Geneva

Div. Reference: **sa_01**
Reg. Reference:

12 OCT. 2006

Your Excellency Mrs. Ambassador:

I have the pleasure of replying to your kind note of September 19th of this year.

With regards to question, we have not found at the Organization original texts in Spanish where the expression "objetos de comercio" was translated to English.

However, we can indicate phrases in English that have been translated to Spanish with the phrases "objetos de comercio", to wit: "*articles of trade*" and '*wares*' (for example, in the documents WT/DS/236/R, WT/DS/257/R and WT/DS/257/ABR)

Furthermore, in the 19th century, the English expressions "*objects of trade*" and "*articles of trade*" were used to describe goods or articles that were object of trade.

Hoping this information will be useful for you, I take this opportunity to reiterate the assurances of my highest and distinguished consideration.

[Signed]
Neil Johnston
Director

Language Services and Documentation Division

Centre William Rappard Rue de Lausanne 154 Case postal CH – 1211 Genève 21
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Annex 64

FORMAL OPINION OF DR. MANUEL SECO REYMUNDO
OF THE ROYAL SPANISH ACADEMY, 2 MAY 2008
(A) ENGLISH TRANSLATION OF OPINION AND CV OF DR. SECO
(B) SPANISH ORIGINAL OF OPINION OF DR. SECO

Opinion on the phrase "con objetos de comercio" in the text of the Border Treaty between Costa Rica and Nicaragua signed on April 15, 1858

By
Manuel Seco Reymundo, of the Spanish Royal Academy

1. At the request of the Agent of the Republic of Nicaragua before the International Court of Justice, Ambassador Carlos Argüello Gómez, I present my opinion on the proper interpretation of the phrase, ***"con objetos de comercio,"*** which appears in Article VI of the Border Treaty between Costa Rica and Nicaragua signed on April 15, 1858.

2. I have read the entire text of the Treaty, in both its printed and handwritten versions, without finding any difference between them. Article VI reads as follows, verbatim: *"La República de Costa Rica tendrá en dichas aguas* [del Río San Juan] *los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo CON OBJETOS DE COMERCIO ya sea con Nicaragua o al interior de Costa Rica"*. The debate is over the exact meaning of the words in question, which an official version in English translates as "*FOR PURPOSES OF COMMERCE*", or rather, 'con fines comerciales.'

3. In order to determine the proper reading, I began by reviewing the meanings that a selection of Spanish dictionaries identify for the noun **OBJETO**. In listing them, I am omitting meanings that are irrelevant to this case.

> ***a)*** SPANISH ROYAL ACADEMY, *Dictionary* called *Authoritative* (V, 1737): **[1]** "What is perceived with one of the senses, or something on which the senses are exercised." **[2]** "The end or purpose of acts of the faculties." **[3]** "The purpose or intent toward which something is directed or aimed" [quoting a passage from Solís, Hist. Nuev. Esp.: "*With no definite purpose [objeto] , not knowing where the gratifying obscurity of his hopes were calling him"*]. **[4]** "The subject matter or topic of a science; as in the subject [objeto] of Theology, which is God."
>
> ***b)*** SPANISH ROYAL ACADEMY, *Dictionary of the Spanish Language*, 22nd edition (2001): **1.** "Anything that may be known or sensed by an individual, including the individual himself." **2.** "That which serves as subject matter or topic when exercising the mental faculties." **3.** "End or purpose of acts of the faculties." **4.** "Purpose or intent toward which an

action or operation is directed or aimed." 5. "Subject matter or topic addressed by a science or field of study." 6. "Thing."

***c)* Esteban de Terreros, *Spanish Dictionary* (II, 1787): [1] "That which we see, watch, love, imagine, etc." [2] "Subject [objeto] of a science, examination, etc." [3] "See Purpose, goal" [Purpose, "the ultimate cause, which makes us work to achieve it"].**

***d)* María Moliner, *Dictionary of Spanish Usage*, 3rd edition (2007): 2. "Thing. ■ In particular, tangible thing, especially one not large in size.... '*A paperweight is an object [objeto] placed on papers to prevent them from moving.*' ■ (pl.) With the meaning of "implements" or "effects," its use is preferred in some cases over "things": '*Writing implements [objetos]*'..." 4. "With respect to an action, a mental operation, a feeling, etc., thing of any type, physical or spiritual, tangible or intangible, real or imaginary, abstract or concrete, toward which they are directed or on which they are exercised: '*You are the object [objeto] of his attacks. The object [objeto] of his concern. The object [objeto] of his admiration.*' ■ Thing with which a document, conversation, conference, etc. deals: '*The subject [objeto] of the speech.*'" 5. "Thing sought in doing something: '*The purpose [objeto] of the meeting. The purpose [objeto] for having called them. The purpose [objeto] for which we are gathered here.*'"**

***e)* Manuel Seco, Olimpia Andrés and Gabino Ramos, *Dictionary of Modern Spanish* (1999): 1. "Material thing perceivable by the senses" (Alvarado, Anatomy, 87: "*The functioning mechanism of the eye differs from that of a photographic device in the way that it focuses on the objects [objetos] that one wishes to see*"). 1b. "Solid and inert thing" (Arce, Testament, 84: "*He had something in his hands that gleamed. He seemed to be quite absorbed in the object [objeto] that he was cleaning ... with the handkerchief*"). 2. "Thing that an action attempts to achieve or at which it is aimed" (Medio, Bibiana, 255: "*Bibiana doesn't have the slightest idea what the purpose [objeto] of the demonstration is.*"). 3. "Person or thing with which [something (object of possession)] deals." (Gambra, Philosophy, 15: "*Each science starts out from several postulates or axioms, ..., and abides by them to deal with its subject [objeto]*"). 3b. "Person or thing that receives [an act (object of possession]" (Caro Baroja, Inquisitor, 48: "*Llorente replied with a letter on behalf of his coreligionists and presented them as an ongoing object [objeto] of vengeance by a vicious court*").**

4. As can be seen in the five dictionaries, lexicographers give several meanings for the noun ***objeto***, some of them nuanced at times into different sub-meanings.

Although definitions are only sporadically supplemented with quotes or examples in the older works, the more modern ones do so systematically. The basic concepts found in those works can be summarized as follows:

1. **Physical thing perceivable by the senses:** *The objects [objetos] that there are on a table. An object [objeto] of art.*

2. **Purpose or objective:** *The purpose [objeto] of a meeting. Fight without a purpose [objeto].*

3. **A person or thing that receives or on which an act, activity or feeling falls:** *He is an object [objeto] of pity. He was subject to [objeto de] mistreatment. His behavior is subject to [objeto de] criticism.*

4. **Subject matter or topic:** *The subject [objeto] of a science.*

5. According to the English version of the Treaty – already given in § 2–, in the phrase, "*con **objetos** de comercio,*" the noun ***objetos*** would be used in meaning 2 of those that I have just listed, i.e. 'for **purposes** of commerce.' However, this interpretation is not indisputable. Therefore, in order to determine whether the word has this particular meaning, and not another, in this context, I have compared it with the information found on it in two 19th century textual corpora. One is Table 1 of the two tables submitted by the Costa Rican representative, which contains the very passage in question. This Table relates to the entire 19th century. The other is the Diachronic Corpus of Modern Spanish (Corpus Diacrónico del Español Actual - CORDE) of the Spanish Royal Academy (http://www.rae.es). I will briefly cite the two corpora – the **Table of Costa Rica** or **Costa Rica Table** and **CORDE**, respectively – below.

I also consulted the part of the *Spanish-American Lexicon 1493-1993* by Peter Boyd-Bowman (electronic edition, New York, 2003) pertaining to the 19th century, but without obtaining valid results.

6. To properly assess the information offered by dictionaries, it is important not to lose sight of the fact that this information is *lexical* in nature; therefore, it is basically limited to the content, or the different possible contents, of *a simple word* in a statement, outside of any situation. When the *potential* content is numerous, as in this case, the *real* meaning (that is, 'de facto,' 'actual') of a word in a phrase, its precise content, is only obtained thanks to *the context in which it appears in the actual speech of a specific issuer (speaker or writer)*. In other words, it is the *syntactical* and not the purely *lexical* aspect of a noun. Although the dictionary gives us the semantic *potentiality* of a word, only its specific use can give us the concrete *realization* of that potentiality.

The problem usually arises when a speaker does not succeed in expressing what he/she wishes to say with the necessary accuracy; that accuracy is usually intuitively grasped by the listener/reader thanks to the context in which the word is placed. With polysemous nouns – such as the one that concerns us here – it is natural for the different meanings to be interrelated, and for a speaker him/herself not to be always clear as to which meaning he/she is thinking of when using the word, or even to have two close notions superimposed in his/her mind at the time. It is up to the receiver (listener or reader) to infer what the issuer really wanted to say.

7. The foregoing considerations are needed to explain why, in the following study and semantic classification of the passages selected to clarify the meaning of the specific phrase that concerns us, it is not always possible to establish with absolute certainty to which meaning an expression refers. In such cases, I have chosen the most probable interpretation. When the probabilities were fairly similar, I considered the case invalid.

8. As stated in § 6, my study was not limited to the lexical aspect, but also included the syntactical aspect. To conduct the study, I made use of the materials contained in the two corpora mentioned in § 5. I did not base the study on the simple noun ***objeto*** in its singular form, but rather on the noun as it appears in the text in question: in its plural form, and particularly as part of the construction "objects + of + noun (***objetos*** + ***de*** + sustantivo)."

In my study, I ignored the preposition ***con [with]*** at the start of the phrase. This element is, in fact, irrelevant to the investigation. The basic connotations this proposition gives to the nouns it precedes are those of 'company,' 'concomitance,' 'instrument or means' and 'mode.' It is of interest when regularly associated with the singular form ***objeto,*** creating phrases such as ***con objeto de*** or ***con este objeto*** (§ 9); but this never occurs with the plural form ***objetos***. ***Con objetos de***, with that meaning, would be a ***hapax*** case (in other words, a unique case, with no confirmation).

9. I have left the singular form ***objeto*** out of the investigation. The reason is that in its real life, outside dictionary showcases, it does not always behave at all the same way as the plural form. A simple review of the Costa Rica Table allows for a first general observation: use of the singular ***objeto*** is much more abundant than the plural ***objetos.*** Second, when it appears, it is mostly found in the sense of "purpose or objective," particularly in virtually lexicalized constructions, such as the prepositional phrase, ***con el objeto de*** (sometimes in variations, such as ***con objeto de***, ***con el único objeto de*** and ***para el objeto de***), or the adverbial phrase, ***con este objeto*** (and its variations, ***con tal objeto***, ***con ese objeto***, ***con el objeto expresado***, ***para este objeto***, and ***para el dicho objeto***) – constructions that do not exist in the language for the plural form. This particular vitality of the meaning 'purpose or objective' in usage in the singular, though quantitatively large albeit with a narrow formal and semantic range, is confirmed by the fact that, in current language, that meaning has remained strong in the two aforementioned phrases and, in addition, in free usages which nevertheless have limited freedom, such as ***the object [objeto] of the visit, the object [objeto] of his efforts, the object [objeto]***

of the operation, the object [objeto] of this book. These uses are currently under the threat, already in progress, of seeing ***objeto*** replaced with the synonym *objective [objetivo]*.

10. The procedure I followed to clarify the issue of the true meaning of the phrase ***objetos de comercio*** was,

- first, a **general review** of all cases of the combination ***objetos de*** recorded in the CORDE for the 19th century;
- second, in view of the high number of appearances, **cataloging** the CORDE cases pertaining to the period between 1810 and 1880 (70 years, approximately the period covered by Costa Rica's Table);
- **classifying** those materials based on the meaning of each of the cases, according to the fundamental meanings of ***objeto*** (§ 4), then making the same classification of the materials contained in Costa Rica's Table;
- a **specific study** of the phrase ***objetos de comercio*** as it appears in the different source documents.

11. In the following Annexes, the cases are cited and classified according to the meaning of the noun ***objetos*** in the respective context, providing in each case the information that allows them to be examined in a broader context. The first is the phrase covered by this study, followed by other similar or related phrases.

Annex 1. The phrase ***objetos de comercio***.

Annex 2. Phrases similar or related to ***objetos de comercio***.

Annex 3. The noun ***objetos*** with the meaning of 'persons or things that receive or on which the act, activity or feeling expressed by the noun that follows fall.'

Annex 4. The noun ***objetos*** with the meaning 'purposes or objectives.'

Annex 5. The noun ***objetos*** with the meaning 'material things perceivable by the senses.'

Annex 6. The noun ***objetos*** with the meaning 'subject matters or topics.'

12. In Annex 5, the sampling of cases from the CORDE is limited to the year 1860, because after that, the number of cases skyrocketed without contributing anything of obvious interest. On the other hand, in Annex 1, the most important one for this investigation, the information-gathering time period had to be expanded considerably, as explained below.

13. For the specific phrase ***objetos de comercio***, the CORDE contained three cases in the period covered by the study. They did not have the meaning 'purposes or objectives' assigned to the 1858 Treaty by the English version. Rather, the meaning was unmistakably 'things on which the activity of commerce falls.' To be more certain, I expanded my search in the corpus up to the mid-20th century, and the five records added only confirmed the meaning clearly shown in the first three. The same interpretation is perfectly consistent with the text of the Treaty. In all the examples found, the two from Costa Rica's Table and the eight from the CORDE, the structure **'objects of + name of activity (*objetos de* + nombre de actividad)'** appears; this structure is well-illustrated in Annex 2 and especially in Annex 3.

14. Consequently, based on all the information studied, my conclusion is that, in the text of Article VI of the Border Treaty between Costa Rica and Nicaragua signed on April 15, 1858, the phrase *con objetos de comercio* should be understood as 'with things on which commercial activity falls.'

And in witness whereof for all pertinent effects, I sign this Opinion in Madrid on May 2, 2008.

[Signed]

(...)

MANUEL SECO REYMUNDO

CURRICULUM VITAE
(Short version)

Born in Madrid, 20 September 1928.

Bachelor in Romance Philology, Extraordinary Award, Central University (now Complutense), 1952.

Doctor in Romance Philology, Extraordinary Award, Central University (now Complutense), 1969.

Professor in Language and Spanish Literature, Institutes of Secondary Education, selected through public examination, in 1960.

Numerary Member of the Royal Extraordinary Award Academy, elected in 1979. Took charge in 1980.

Director, Seminary of Lexicography of the Royal Spanish Academy from 1981 to 1993. He became member of that Seminary in 1962, by invitation of Mr. Rafael Lapesa, where he has been editor, special editor, chief editor and academic editor.

Adviser to the Lexicographic Institute of the Royal Spanish Academy from 2000 to present.

First President of the Spanish Association of Lexicographic Studies. 2003-2004.

Member of the Board, Ramón Menéndez Pidal Fundation. 2004-2007.

Main publications (books)

Diccionario de dudas y dificultades de la lengua española. Prólogo de Salvador Fernández Ramírez (1ª ed., Madrid, Aguilar, 1961; 10ª ed., Madrid, Espasa Calpe, 1998, 14ª reimpresión, 2008).

Arniches y el habla de Madrid. Premio Rivadeneira de la Real Academia Española (Madrid, Alfaguara, 1970).

Gramática esencial del español (1ª ed., Madrid, Aguilar, 1972; 3ª ed., Madrid, Espasa Calpe, 1995. En edición de bolsillo, 1ª ed., 1994 ; 5ª ed., 2ª reimpresión, 2007).

Las palabras en el tiempo: los diccionarios históricos (Madrid, Real Academia Española, 1980). [Discurso de ingreso en la R.A.E.].

Estudios de lexicografía española (Madrid, Paraninfo, 1987; 2ª ed., aumentada, Madrid, Gredos, 2003).

Director (1981-1993) of *Diccionario histórico de la lengua española* (Madrid, Real Academia Española, Seminario de Lexicografía). Previously, from 1962 to 1980, while the director was Mr. Rafael Lapesa, he collaborated on the book and as editor, special editor, chief editor and academic editor.

Director and editor del *Diccionario del español actual*. Premio de Cultura de la Comunidad de Madrid (2 vols., 4760 págs., Madrid, Aguilar, 1999). In colaboration with Olimpia Andrés (editing) and Gabino Ramos (documentation).

Director of *Diccionario abreviado del español actual* (Madrid, Aguilar, 2000). In collaboration with Olimpia Andrés and Gabino Ramos.

Edition of *Léxico hispánico primitivo (siglos VIII al XII)*, first version of *Glosario del primitivo léxico iberorrománico;* initially planned and directed by Ramón Menéndez Pidal, and drafted by Rafael Lapesa in collaboration with Constantino García (Madrid, Fundación Ramón Menéndez Pidal/Real Academia Española, 2003).

Director of *Diccionario fraseológico documentado del español actual* (Madrid, Aguilar, 2004). Editor, Olimpia Andrés. Additional documentation, Olimpia Andrés and Carlos Domínguez.

Adviser to *Diccionario del estudiante* (Madrid, Real Academia Española, 2005), directed by Elena Zamora.

Adviser to *Diccionario práctico del estudiante* (Madrid, Real Academia Española, 2007), directed by Elena Zamora.

Awards and distintions

Rivadeneira Award of the Royal Spanish Academy (1969), with *Arniches y el habla de Madrid.*

Culture Award (Literature) Madrid (1999), with *Diccionario del español actual.*

Grand Cross of the Civil Order of Alfonso X the Wise.

Honorary Member of the Colombian Language Academy.

Honorary Member of the Caro and Cuervo Institute, Bogota

Honorary Researcher in the Bolivian Institute of Lexicography, La Paz.

Honorary Associate of the Federation of Associations of Spanish Professors.

Honorary President of the Spanish Association of Lexicographic Studies.

Madrid, May 2008

Dictamen sobre el sintagma "con objetos de comercio" en el texto del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858

Por

Manuel Seco Reymundo, de la Real Academia Española

1. A instancias del Sr. Agente de la República de Nicaragua ante la Corte Internacional de Justicia, Embajador D. Carlos Argüello Gómez, expongo mi parecer sobre la adecuada interpretación de la expresión ***"con objetos de comercio"*** que figura en el artículo VI del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858.

2. He leído el texto íntegro del Tratado, tanto en su versión impresa como en la manuscrita, sin apreciar ninguna variante entre ellas. En su artículo VI se dice textualmente: *"La República de Costa Rica tendrá en dichas aguas* [del Río San Juan] *los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo CON OBJETOS DE COMERCIO ya sea con Nicaragua o al interior de Costa Rica"*. Se discute sobre el sentido exacto de las palabras señaladas, que una versión oficial en inglés traduce "*FOR PURPOSES OF COMMERCE*", esto es, 'con fines comerciales'.

3. Con el propósito de determinar cuál es la lectura correcta, he comenzado por repasar los sentidos que una selección de diccionarios del español distinguen en la voz OBJETO. Al exponerlos, omito acepciones irrelevantes para nuestro caso.

> *a)* REAL ACADEMIA ESPAÑOLA, *Diccionario* llamado *de Autoridades* (V, 1737): [1] "Lo que se percibe con alguno de los sentidos, o acerca de lo qual se exercen". [2] "El término o fin de los actos de las potencias". [3] "El fin o intento a que se dirige o encamina alguna cosa" [cita un pasaje de Solís, Hist. Nuev. Esp.: "*Sin objeto determinado, sin saber hacia dónde le llamava la obscuridad lisonjera de sus esperanzas*"]. [4] "La materia o el sujeto de una ciencia; como el objeto de la Theología, que es Dios".
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> *b)* REAL ACADEMIA ESPAÑOLA, *Diccionario de la lengua española*, 22ª ed. (2001): 1. "Todo lo que puede ser materia de conocimiento o sensibilidad de parte del sujeto, incluso este mismo". 2. "Aquello que sirve de materia o asunto al ejercicio de las facultades mentales". 3. "Término o fin de los actos de las potencias". 4. "Fin o intento a que se dirige o encamina una acción u operación". 5. "Materia o asunto de que se ocupa una ciencia o estudio". 6. "Cosa".
>
> *c)* ESTEBAN DE TERREROS, *Diccionario castellano* (II, 1787): [1] "Aquello que vemos, miramos, amamos, imajinamos, etc.". [2] "Objeto de una ciencia, examen, etc.". [3] "V. Fin, blanco" [Fin, "la causa final, que nos hace obrar para conseguirle"].
>
> *d)* MARÍA MOLINER, *Diccionario de uso del español*, 3ª ed. (2007): 2. "Cosa. ■ Particularmente, cosa corpórea y, en especial, de no gran tamaño ... '*Pisapapeles es un objeto que se coloca sobre los*

papeles para evitar que se muevan'. ■ (pl.) Con el significado de "enseres" o "efectos", se emplea en algunos casos con preferencia a "cosas": '*Objetos de escritorio*'...". 4. "Con respecto a una acción, una operación mental, un sentimiento, etc., cosa de cualquier clase, material o espiritual, corpórea o incorpórea, real o imaginaria, abstracta o concreta, a la cual se dirigen o sobre la que se ejercen: '*Tú eres el objeto de sus ataques. El objeto de su preocupación. El objeto de su admiración*'. ■ Cosa de la que se trata en un escrito, en una conversación, una conferencia, etc.: '*El objeto del discurso*'". 5. "Cosa que se pretende al hacer algo: '*El objeto de la reunión. El objeto de haberles llamado. El objeto de que estemos aquí reunidos*'...".

e) MANUEL SECO, OLIMPIA ANDRÉS y GABINO RAMOS, *Diccionario del español actual* (1999): 1. "Cosa material perceptible por los sentidos" (Alvarado, Anatomía, 87: "*El mecanismo de funcionamiento del ojo difiere del de la máquina fotográfica en la forma de realizar el enfoque de los objetos que se desean mirar*"). **1b.** "Cosa sólida e inerte" (Arce, Testamento, 84: "*Algo tenía en sus manos que relucía. Parecía muy absorto en aquel objeto que limpiaba ... con el pañuelo*"). 2. "Cosa que se trata de conseguir o a la que se dirige una acción" (Medio, Bibiana, 255: "*Bibiana no tiene la menor idea del objeto de la manifestación*"). **3.** "Persona o cosa sobre la que versa [algo (compl. de posesión)]". (Gambra, Filosofía, 15: "*Cada ciencia parte de unos postulados o axiomas ..., y ateniéndose a ellos trata su objeto*"). **3b.** "Persona o cosa que recibe [un hecho (compl. de posesión)]" (Caro Baroja, Inquisidor, 48: "*Llorente replicó con una carta en nombre de sus correligionarios y los presentó como objeto permanente de la venganza de un tribunal perverso*").

4. Los lexicógrafos, según se observa en los cinco diccionarios, apuntan para la voz ***objeto*** varias acepciones, algunas de ellas a veces matizadas en distintas subacepciones. Las definiciones, si en las obras más antiguas solo esporádicamente aparecen completadas por medio de citas o ejemplos, en las más avanzadas lo hacen de manera sistemática. Los conceptos básicos que en ellas se exponen pueden sintetizarse así:

1. **Cosa material perceptible por los sentidos:** *Los objetos que hay sobre la mesa. Un objeto de arte.*

2. **Fin u objetivo:** *El objeto de una reunión. Pelear sin objeto.*

3. **Persona o cosa que recibe, o sobre la que recaen, un hecho, una actividad o un sentimiento:** *Es objeto de compasión. Fue objeto de malos tratos. Su comportamiento es objeto de críticas.*

4. **Materia o asunto:** *El objeto de una ciencia.*

5. Según la versión inglesa del Tratado –ya expuesta en § 2–, en la expresión "*con **objetos** de comercio*" se utilizaría la voz ***objetos*** en el sentido 2 de los que acabo de señalar; es decir, 'con **fines** de comercio'. Pero no es indiscutible esta interpretación. Y para dilucidar si es este y no otro el valor que en este contexto tiene la palabra, lo he contrastado con los datos sobre ella de dos corpus textuales del siglo XIX. Uno es la Tabla I, de las dos aportadas por la representación de Costa Rica, en la cual está recogido el propio pasaje en cuestión. Esta Tabla versa sobre todo el siglo XIX. El otro es el Corpus Diacrónico del Español Actual (CORDE), de la Real Academia Española (http://www.rae.es). En adelante citaré en forma abreviada los dos corpus **Tabla de Costa Rica** o **Tabla Costa Rica** y **CORDE**, respectivamente.

Consulté también la parte correspondiente al siglo XIX del *Léxico hispanoamericano 1493-1993*, de Peter Boyd-Bowman (edición electrónica, New York, 2003), pero sin obtener resultados válidos.

6. Para la correcta valoración de los datos ofrecidos por los diccionarios, es importante no perder de vista que en ellos tal información es de carácter *léxico* y que por tanto se limita en principio al contenido, o los diversos contenidos posibles, de *la simple palabra* abstraída de cualquier situación en un enunciado. Cuando el contenido *potencial* es múltiple, como en el caso que nos interesa, el valor *actual* (esto es, 'de hecho', 'efectivo') de la palabra en la frase, la precisión de su contenido, solo se obtiene gracias *al contexto en que ella aparece dentro del habla real de un emisor (hablante o redactor) concreto*. Esto es, la vertiente *sintáctica*, y no puramente *léxica*, de la voz. Si el diccionario nos indica la *potencialidad* semántica de la palabra, solo el uso puntual de esta puede darnos la *realización* concreta de tal potencialidad.

El problema se presenta habitualmente cuando el hablante no acierta a exponer con la necesaria exactitud lo que quiere expresar; exactitud que de modo intuitivo suele captar el oyente/lector gracias al contexto en que se inserta la palabra. En las voces polisémicas –como la que aquí nos ocupa– es un hecho natural que los varios sentidos estén emparentados unos con otros, y que el propio hablante no tenga siempre claro en cuál de ellos está pensando al usar la palabra, o incluso tenga en su mente en ese momento superpuestas dos nociones vecinas. Al receptor (oyente o lector) le toca inducir lo que de verdad quiso decir el emisor.

7. Las precedentes consideraciones son explicación necesaria de por qué, en el siguiente estudio y clasificación semántica de los pasajes seleccionados con vistas a esclarecer el valor del sintagma concreto que nos interesa, no siempre es posible establecer con absoluta seguridad a qué sentido corresponde un enunciado. En tales casos he optado por la interpretación más probable. Cuando las probabilidades eran bastante parejas, he considerado inválido el caso.

8. De acuerdo con la dicho en § 6, he llevado a cabo mi estudio no limitándome a la vertiente léxica, sino contando con la vertiente sintáctica. Para ello me he servido de los materiales contenidos en los dos corpus mencionados en § 5. No he atendido al simple nombre ***objeto*** en su forma singular, sino tal como se presenta en el texto en cuestión: en su forma plural y en especial formando parte de una construcción "***objetos*** + ***de*** + sustantivo".

En mi estudio me he desentendido de la preposición ***con***, inicial del sintagma. Este elemento es de hecho irrelevante para la pesquisa. Las connotaciones básicas que esta preposición aporta a los sustantivos a los que precede son las de 'compañía', 'concomitancia', 'instrumento o medio' y 'modo'. Sí tiene interés cuando se asocia de manera estable con la forma singular ***objeto***, constituyendo locuciones como ***con objeto de*** o ***con este objeto*** (§ 9); pero este funcionaniento nunca se da con la forma plural ***objetos***. ***Con objetos de***, con ese valor, sería un caso ***hapax*** (es decir, único, sin ninguna confirmación).

9. He dejado al margen de la investigación la forma singular ***objeto***. La razón es que en su vida real, fuera de la vitrina de los diccionarios, no se comporta en todo del mismo modo que la forma plural. El simple repaso de la Tabla de Costa Rica permite una primera observación general: el uso del singular ***objeto*** es mucho más abundante que el del plural ***objetos***. En segundo lugar, en sus apariciones es mayoría notable el sentido de 'fin u objetivo', de manera particular en construcciones prácticamente lexicalizadas como la locución prepositiva ***con el objeto de*** (a veces en variantes como ***con objeto de***, ***con el único objeto de*** y ***para el objeto de***), o la locución adverbial ***con este objeto*** (y sus variantes ***con tal objeto***, ***con ese objeto***, ***con el objeto expresado***, ***para este objeto***, ***para el dicho objeto***) –construcciones que en la lengua no existen para la forma plural–. Esta vitalidad especial del valor 'fin u objetivo' en el uso singular, cuantitativamente grande pero de abanico formal y semántico estrecho, se confirma en el hecho de que, en la lengua actual, ese sentido se ha mantenido fuerte en las dos locuciones mencionadas, y, fuera de ellas, en usos libres aunque de libertad limitada, como *el objeto de la visita, el objeto de sus esfuerzos, el objeto de la operación*, *el objeto de este libro*, usos hoy bajo la amenaza, ya en marcha, de sustitución de ***objeto*** por el sinónimo ***objetivo***.

10. El procedimiento que he seguido para esclarecer la cuestión del verdadero sentido del sintagma ***objetos de comercio*** ha sido,

- en primer lugar, un **examen general** de la totalidad de casos de la combinación ***objetos de*** registrados en el CORDE para el siglo XIX;
- en segundo lugar, en vista del elevado número de apariciones, la **catalogación** de los casos del CORDE pertenecientes al período comprendido entre los años 1810 y 1880 (70 años, aproximadamente la extensión abarcada por la Tabla de Costa Rica);
- la **clasificación** de esos materiales por el sentido de cada uno de los casos, según las acepciones fundamentales de ***objeto*** (§ 4), sometiendo después a la misma clasificación los materiales recogidos en la Tabla de Costa Rica;
- el **estudio particular** del sintagma ***objetos de comercio*** tal como aparece en una y otra fuente documental.

11. En los Anexos que siguen están reproducidos y clasificados los casos según el sentido de la voz ***objetos*** dentro del respectivo contexto, con indicación, en cada uno, de los datos que permiten examinarlos en contexto más amplio. Ocupa el primer lugar el sintagma objeto del presente estudio, seguido de otros sintagmas análogos o afines.

Anexo 1. El sintagma ***objetos de comercio***.

Anexo 2. Sintagmas análogos o afines a ***objetos de comercio***.

Anexo 3. El nombre ***objetos*** con el sentido de 'personas o cosas que reciben, o sobre las que recaen, el hecho, la actividad o el sentimiento expresados por el sustantivo que sigue'.

Anexo 4. El nombre ***objetos*** con el sentido de 'fines u objetivos'.

Anexo 5. El nombre ***objetos*** con el sentido de 'cosas materiales perceptibles por los sentidos'.

Anexo 6. El nombre ***objetos*** con el sentido de 'materias o asuntos'.

12. En el Anexo 5 está reducido el muestrario de casos del CORDE hasta el año 1860, porque a partir de ahí la cifra se disparaba sin aportar ningún interés aparente. Por el contrario, en el Anexo 1, el más importante para esta investigación, hube de ampliar considerablemente el plazo de recogida de datos, como expongo a continuación.

13. Para el preciso sintagma ***objetos de comercio***, el CORDE, en el período acotado, registraba tres casos, que no correspondían al sentido de 'fines u objetivos' asignado por la versión inglesa al texto del Tratado de 1858, sino inequívocamente al de 'cosas sobre las que recae la actividad del comercio'. Para cerciorarme más, amplié mi búsqueda en el corpus hasta mediados del siglo XX, y los cinco registros añadidos no hicieron más que confirmar el valor claramente mostrado en los tres primeros. La misma interpretación es perfectamente compatible con el texto del Tratado. En todas las muestras halladas, las dos de la Tabla de Costa Rica y las ocho del CORDE, se presenta la estructura '***objetos de* + nombre de actividad**' que está bien ejemplificada en el Anexo 2 y sobre todo en el Anexo 3.

14. Mi conclusión, por consiguiente, a la vista de todos los datos estudiados, es que, en el texto del Artículo VI del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858, el sintagma *con objetos de comercio* debe entenderse 'con cosas sobre las que recae la actividad comercial'.

Y para que conste donde convenga, firmo el presente Dictamen en Madrid a 2 de mayo de 2008.

Annex 65

AFFIDAVIT OF WILLIAM ABURTO ESPINOZA, 8 MARCH 2008

Testimony of Public Document Number Twelve - Notarial Certificate. In the town of El Castillo, El Castillo Municipality, San Juan River Province, at three in the afternoon on the eighth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **WILLIAM ABURTO ESPINOZA,** stands before me and in his own name, with identity card number 522-060246-0000E, of age, single, carpenter and retired boatman, and domiciled in El Castillo, River San Juan Province. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of Nicaragua, born in the town of El Castillo, El Castillo Municipality, San Juan River Province, the sixth of February, 1946. As I was born in El Castillo, where I have spent all my life, I am very familiar with the activities on the San Juan River. I am currently retired and living in El Castillo.

Second: During the 1960s, I worked on the river transporting fuel and sometimes goods between communities located on the river. My river shipment business ended in the 1970s due to the onset of the war in Nicaragua. While I was working on the river, there were a few Costa Ricans and Nicaraguans who navigated the river like myself to transport goods from one community to another. None of these boatmen used the river for shipments outside the local river communities. The materials being transported on the river in the 1960s were mostly fuel, bananas, coconut oil, and wood, all from the same areas.

Third: Some of my shipments began at Puerto Viejo, continuing on the Sarapiquí River and crossing into the San Juan River. When leaving Puerto Viejo, Costa Rica, I was required to pay five córdobas or colones for the departure clearance certificate. Upon reaching the Costa Rican military post at Sarapiquí, I had to stop and report myself and show the certificate I had previously purchased. After crossing the San Juan River in Nicaraguan territory both the Nicaraguan and Costa Rican boatmen were required to register at the Sarapiquí post in Nicaraguan territory and pay the departure clearance certificate fee of five córdobas.

Fourth: During this time, there was very little activity on the river. I would roughly estimate that there were 150 families living along the entire bank of the San Juan River, including a small community with a school located at Sarapiquí. Almost no one lived near Delta, at the beginning of the Colorado River, or near Boca San Carlos. There were also no settlements on the Nicaragua bank of the San Juan River, except for the one at San Juan del Norte, today San

Juan de Nicaragua. During the twelve hour trip between San Juan del Norte and El Castillo, I would normally see one or two boats on the river. Most of the boats that I saw were small boats belonging to the local neighbors, who lived in Costa Rican territory, navigating short distances in their private boats for personal reasons.

Fifth: It was rare for a boat to navigate at night. Local residents and other boatmen made their trips during the day, and only used the river at night in cases of emergency. It is dangerous to navigate the San Juan River at night because it becomes dark quickly and there are trees and large pieces of wood in the river in addition to large sand banks.

Sixth: During that time, Costa Rica had two military posts on the bank, one at the mouth of the San Carlos River and the other at the mouth of the Sarapiquí River. They did not have any customs stations on the San Juan River, or at Puerto Viejo, or at Sarapiquí. Neither did they have any customs posts at any of the docks on the San Carlos River. The Costa Rican officers at the two military posts on the San Juan River did not attempt to regulate, control or interfere with any of the boat traffic on the San Juan. They only supervised boats when they entered and navigated on the Sarapiquí and San Carlos Rivers. From time to time I saw Costa Rican Civil Guard boats traveling on the San Juan River, but they never attempted to exercise any authority on the river and the times that I observed them they were unarmed.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) WAburtoE (f) Molina.

This occurred before me from the back of folio number eleven to the back of folio number seventeen, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on one page of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at ten in the morning of the tenth of March, 2008.

Annex 66

AFFIDAVIT OF RIGOBERTO ACEVEDO LEDEZMA.
27 MAY 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER SEVENTEEN - NOTARIAL DECLARATION. In the town of Greytown, Municipality of San Juan de Nicaragua, San Juan River Province, at eleven in the morning on the twenty-seventh of May, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ**, Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua and in transit through this town, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2013. Mister **RIGOBERTO ACEVEDO LEDEZMA**, stands before me and in his own name, with identity card number 525-030962-0000J, of age, single, businessman, and domiciled in the town of Greytown, Municipality of San Juan de Nicaragua, San Juan River Province. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

FIRST: I am a citizen of the Republic of Nicaragua, born in Greytown, Municipality of San Juan de Nicaragua, San Juan River Province, on the third of September, 1962. I currently work as a boatman, transporting goods between Puerto Viejo, Costa Rica, and San Juan de Nicaragua. I have been doing this work for over ten years. As a result, I navigate the San Juan River between the two countries approximately three times per month. My business involves transporting basic food supplies from Puerto Viejo to several small shops and local restaurants located in San Juan de Nicaragua. On the return, I rarely transport goods on the same route, as there is little commerce out of San Juan de Nicaragua, except for an occasional delivery of coconuts to Puerto Viejo.

SECOND: During my trips, I have not seen many boats that transport merchandise. In the stretch between Puerto Viejo and San Juan de Nicaragua, only I am dedicated to transporting goods. Until one year ago, there were two more Costa Rican boatmen who traveled this same route. Another two Nicaraguans cover the area between San Juan de Nicaragua and El Castillo, transporting products of basic necessity. Also, for the last ten years three boatmen have been navigating, two of whom are Costa Rican and one who is Nicaraguan, using the San Juan River to transport shellfish from San Juan de Nicaragua to Puerto Lindo, Costa Rica.

THIRD: The route that I normally travel begins in Puerto Viejo, Costa Rica, and continues North on the River Sarapiquí which ends at the San Juan River. Later, I continue East on the San Juan River ending at San Juan de Nicaragua, where the eastern most point of the river is located until its outlet into the Caribbean Sea (Atlantic Ocean). On this route, I pass both the Costa Rican and Nicaraguan military posts located at Boca de Sarapiquí, in addition to the Nicaraguan posts located at Delta, where the San Juan River divides and the

Colorado River begins, and the post at San Juan de Nicaragua. There is no regulatory process upon exiting Puerto Viejo. The Costa Rican authorities do not require me to obtain a departure clearance certificate, however once a year they carry out a technical inspection of the boat. As there is no customs office, there is also no need to declare the goods that I bring from Nicaragua, and there is no requirement to pay any taxes on imports or exports at Puerto Viejo. Upon reaching the Costa Rican Sarapiquí post, which is about three hours from Puerto Viejo, I must bank my boat and register with the Costa Rican authorities by providing information on myself, the boat, the cargo and the destination. After entering into Nicaraguan territory by the San Juan River, I must also bank my boat, and register by providing information on myself, the boat, the cargo and the destination. I am then required to submit my boat to a safety inspection by the Nicaraguan authorities and, upon passing the inspection, to purchase a departure clearance certificate for my boat, at a cost of twenty córdobas. I am not aware of any occasions when any of the Costa Rican boatmen who navigate the river taking goods either to Nicaragua or to Costa Rica have been prevented from completing their trip, by Nicaraguan authorities posted along their routes. As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the front of folio number forty-seven to the front of folio number forty-eight, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on one page of legally sealed paper, which was signed, sealed, and dated in the city of Managua, at four in the afternoon of the thirtieth of May, 2008.

Annex 67

AFFIDAVIT OF BENEDICTO ADAM BORGES REQUENES, 26 MAY 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER TWENTY-SIX - NOTARIAL DECLARATION. In the city of San Carlos, San Juan River Province, at two in the afternoon on the twenty-sixth of May, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua and in transit through this town, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2013. **BENEDICTO ADAM BORGES REQUENES,** stands before me and in his own name, with identity card number 521-110877-0001W, of age, single, with the office of forest ranger, and domiciled in the city of San Carlos. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

FIRST: I am a citizen of the Republic of Nicaragua. My Nicaraguan cedula number is 521-110877-0001W. I was born in the city of San Carlos, San Juan River Province, Nicaragua on the eleventh of August, 1977. I am a forest ranger of the Nicaraguan Ministry of Environment and Natural Resources (Ministerio del Ambiente y Recursos Naturales or MARENA). I am currently the Chief of the San Juan de Nicaragua garrison. I have held this position for twelve years. My duty as a forest ranger is to conserve and promote the environmental resources and protect against the degradation and predation of the flora and fauna, in the San Juan River - Nicaragua Biosphere Reserve, which includes the Indio Maíz Biological Reserve and the San Juan River Wildlife Refuge, located in southern Nicaragua.

SECOND: The Indio Maíz Grand Reserve was established in 1990, under Presidential Decree 527. This decree mandated the Institute of Environment and Natural Resources (Instituto de Ambiente y los Recursos Naturalesas or IRENA), as the Ministry of Environment and Natural Resources was then called, to protect against the following activities prohibited in the reserve: "the expansion of agro-fishing activities, burnings, the logging of forests, the hunting and fishing of protected species, including by nets, fishing lines, explosives or toxic liquids and any other activity which provides for irreversible destruction or permanent damage to the resources, in its aquatic and terrestrial environments inside the reserve."

THIRD: In May 1999, under Presidential Decree 66 , the San Juan River was separated from the Indio Maíz Biological Reserve and established as its own protected area, under the name of the San Juan River Wildlife Refuge.

FOURTH: These protected areas are managed under the framework of several international agreements. Since 1977, Nicaragua joined the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which requires Nicaragua to strictly control the trade of threatened species found in its territory. Currently, over 104 species protected within the Indio Maíz Reserve are on the CITES Convention list, including 42 bird species, 36 mammals, 18 reptiles, and 8 amphibians. On November 30, 1997 the Government of Nicaragua signed the Convention on Wetlands of International Importance especially as Waterfowl Habitat, referred to as the RAMSAR Wetlands Convention, thus obligating itself under the terms of the agreement to protect and conserve its important wetlands. On August 11, 2001, the San Juan River Wildlife Refuge was designated an international protected area, under the RAMSAR Convention. The designation under the RAMSAR Convention further extended the Nicaraguan Government's obligation to the international community to continue to protect the flora and fauna of the reserve, including the San Juan River. Then, in July 2003, UNESCO's Man and the Biosphere Programme designated the Southeastern Biosphere Reserve and additional territory as an international biosphere reserve. This designated area, named the River San Juan Biosphere Reserve, covers eighteen thousand three hundred forty square kilometers.

FIFTH: The Biosphere reserve is acknowledged as one of the two most extensive biological areas of the Mesoamerican Biological Corridor. It is referred to as the "lungs of the Americas," as its trees create an immense quantity of oxygen relied on by many people and animals to survive. The Indio Maíz and San Juan River reserves cover a variety of ecosystems including tropical humid forests and wetlands, tidal marsh, coastal lagoons and estuaries, which are home to a variety of indigenous, rare, and protected species in addition to plant genetic resources. The species protected within the Indio Maíz Reserve include pumas, jaguars, sloths, wild boars, pacas, and monkeys, not to mention poison dart frogs, snakes, turtles, and iguanas. The San Juan River alone harbors four species of turtles, manatees, tilapia, gaspar, crocodiles, lagunero, robalo, sharks, and shrimp, among numerous other species. Notably, the sharks, snooks, tarpon, and tropical gar use the San Juan River to swim to Lake Nicaragua, where they reproduce, though most of the sharks have disappeared due to human activity, including fishing. Many of these aquatic species are rare and endangered such as the bull shark, the smalltooth and largetooth sawfish of the Cocibolca Lake, and the tarpon. Thus the protection of aquatic species in the river and terrestrial species in the reserve is of extreme importance under both domestic and international obligations and agreements.

SIXTH: I am one of two MARENA officials located at the San Juan de Nicaragua post adjacent to the San Juan River. There are three other MARENA posts along the portion of the river over which Costa Rica claims rights, at San Juan del Norte, Delta, Sarapiquí, and Boca San Carlos. There are two MARENA officials at the Delta post, two at the Sarapiquí post, two at the San Juan del Norte post, and two at the Boca San Carlos post. All of the MARENA officials stationed along the San Juan River, myself included, have the responsibility to protect against the dangers to successful conservation of the reserve.

SEVENTH: The greatest dangers which occupy a majority of our efforts on the River San Juan are illegal logging, fishing, and hunting, in addition to the illegal occupation of land within the reserves. The illegal cutting and trafficking of protected trees is a major problem along the river. Illegal loggers, primarily from Costa Rica, enter the reserve to take semi-precious woods, including almond trees, caubilla, and mahogany, which are in high demand on the international market. Also, much of the forested areas on the Costa Rican side of the river have been cut down to provide space for the cattle farms, so local users illegally search for wood for a variety of purposes on the Nicaraguan side of the river. In 2007 alone, MARENA captured over 1,000 trunks and planks of wood which had been taken illegally from the protected area along the San Juan River.

EIGHTH: Both Nicaraguans and Costa Ricans are prohibited from fishing from boats in the San Juan River, using lines or nets, in order to avoid the depletion of the aquatic species within the reserve. Following the river's designation as a protected area, MARENA officers were sometimes lenient with river dwellers, allowing them to fish from boats in the river, despite the river's protected status. Unfortunately, this led to widespread abuse of the the privilege, as local residents began placing large shrimp traps and fish nets in the river for commercial purposes, and using fishing as a pretense for illegally crossing and entering into the Indio Maíz Reserve. As a result, MARENA was compelled to protect the Refuge more strictly. Fishing is thus permitted from the Costa Rican bank only. This permits local residents to meet their subsistence needs, without endangering aquatic life in the river. Sport fishing is permitted within specifically designated areas near San Juan del Norte and El Castillo, for short periods of time. These permits are granted on limited occasions.

NINTH: Frequently, residents cross over from Costa Rica into the terrestrial area of the San Juan River Wildlife Refuge and the Indio Maíz Grand Reserve to illegally hunt for large mammals and birds, either for sale as meat or as pets. Much of this illicit hunting activity takes place at night or during the weekend. Deer, paca, and peccary meat, among others, are sold in the local markets found within Costa Rica or are eaten by the hunters themselves. Also, parrots and macaws, and sometimes monkeys, are sold as pets. Many species, including the scarlet macaw have become endangered as a result of hunting and the destruction of their habitat by logging activities. Because of this, MARENA often searches boats on the river for cages, traps, and illegally captured animals, or plants and wood taken from the reserve.

TENTH: Because of the size of the reserve territory and the limited number of MARENA posts on the river, prevention of the illegal occupation of land within the reserve has also been a challenge. Repeatedly through the years, Costa Rican citizens have illegally occupied land in the Nicaraguan reserve area. These occupations and clearing of land violate the laws protecting the reserve and cause great damage to the surrounding environment. To avoid these incursions, MARENA officials, assisted by the army troops stationed in the area, patrol the river to prevent illegal crossings and regulate the registration of the entry and exit of individuals on the river, to ensure that they do not enter the reserve or engage in illegal activities in the reserve or on the river. As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the back of folio number forty-four to the front of folio number forty-seven, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on two pages of legally sealed paper, which was signed, sealed, and dated in the city of Managua, at two in the afternoon of the thirtieth of May, 2008.

Annex 68

AFFIDAVIT OF GENERAL JAVIER ALONSO CARRIÓN MCDONOUGHT, 23 JUNE 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER TWENTY-NINE - (NOTARIAL DECLARATION). In the city of Managua, at six at night on the twenty-third of June, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, of this domicile and residence, duly authorized by the Honorable Supreme Court of Justice to act as Notary during the five year period that expires on the fifteenth of April, 2013. Mister **JAVIER ALONSO CARRION McDONOUGHT**, stands before me, of age, married, retired from military service, of this domicile, who identifies himself with identity card number zero-zero-one-two-one-one-one-five-four-zero-zero-three-five-E. Who I SWEAR to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act, in which he DECLARES the following:

FIRST: I am a citizen of Nicaragua, born in the city of Managua where I currently reside, and that I was an officer in the Army of Nicaragua from its founding in July nineteen ninety-nine. In that period the name of the army was the Ejército Popular Sandinista [Popular Sandinista Army] which was legally renamed in nineteen ninety-five Ejército de Nicaragua [Army of Nicaragua] according to legal and constitutional amendments. I retired from military service in February two thousand five. During the last five years of my service, I was the Commander in Chief of the Army of Nicaragua, with the rank of Army General, the highest-ranking military officer in Nicaragua, and was directly subordinate to the President of the Republic, in his capacity as Head of State, of Government, and Supreme Chief of the Nicaraguan Army, pursuant to the Constitution of the Republic and other Laws related to the matter. From February nineteen ninety-five to February two thousand, I was the Chief of the General Staff of the Nicaraguan Army, with the rank of General, the second-highest ranking military officer, subordinate to the Commander in Chief of the Army. Before that, from February nineteen ninety to February nineteen ninety-five, I was the Deputy Commander of the General Staff and Chief of the Operations and Plans Directorate, during those five years I held the rank of Army Colonel.

SECOND: In all three of these positions, covering the last fifteen years of my military service between nineteen ninety and two thousand five, I exercised command responsibility in all the country, including the San Juan River, its adjacent area, and the national boundary. Under Presidential mandate, I had relationships with the various Powers of the State, government institutions, and international civilian-military relations. The San Juan River occupied a considerable amount of the General Staff's attention during this time, because it is in a remote and scarcely populated area of the country. The Army is responsible for border security, security in the region, there being no State and Government institutional presence, like immigration, customs, etc. The river is itself a protected natural resource, as well as the gateway to the other environmentally protected areas, like the fragile Indio Maíz Grand Biological Reserve. And it forms part of the boundary with Costa Rica, which begins on the right bank of the San Juan River. For these reasons, I have been familiar with the activities of the Army of Nicaragua on the San Juan River, and the relations between the Army of Nicaragua and the *Guardia Civil* of Costa Rica along the river.

THIRD: Following the end of Nicaragua's internal conflict in nineteen ninety, when usage of the San Juan River has become a virtual scene of that conflict, the river returned to normal, and the Army of Nicaragua early resumed its constitutional and legal mission to assure the security of commercial and personal navigation on the river for the vessels navigating there, by registering of their presence at the border posts along the river, and obtaining a departure clearance certificate manifesting the vessels safety for navigation. This requirement on the river applied to all vessels navigating on the river, including those of Nicaragua and Costa Rica.

FOURTH: From nineteen ninety until the middle of nineteen ninety-eight, relations between the Army of Nicaragua and the *Guardia Civil* of Costa Rica along the San Juan River were excellent, following the good neighbor policy held by both countries. The Nicaraguan Army and the *Guardia Civil* collaborated on strengthening matters affecting both sides of the river, like combating illegal trafficking in arms, drugs or persons. During this period, the *Guardia Civil* asked permission from the Nicaraguan Army to send its boats along the San Juan River to bring supplies and personnel to the different posts that Costa Rica maintained on her territory to the south of the right bank of the river. The Army granted this permission, subject to the conditions that the *Guardia Civil* were required to meet, like obtaining prior authorization for each voyage of this nature, that the vessel stop at the Nicaraguan Army posts at its point of entry into the country and register the voyage and the names of the passengers and crew, that it submit to inspection, that the *Guardia Civil* officers carry no weapons while navigating on the San Juan River (or that they store their arms on the floor of the vessel), and that a Nicaraguan soldier accompany them on the vessel. The *Guardia Civil* accepted these conditions, without objection, and carried out its mission without problems from the early nineteen nineties until the middle of nineteen ninety-eight.

FIFTH: In September nineteen ninety-five, in the Costa Rican *Guardia Civil* base at El Murciélago, Guanacaste, Costa Rice, the collaboration between the Army of Nicaragua and the *Guardia Civil* in strengthening law enforcement activities in their respective jurisdictions was memorialized in a Joint Communiqué signed by Nicaragua's then Chief of the Nicaraguan Army, Army

General Joaquín Cuadra Lacayo, and Costa Rica's Minister of Public Security, Juan Diego Castro Fernández. Both instructed by the Heads of Nicaragua (Violeta Barrios Chamorro) and of Costa Rica (José María Figueres Olsen). The Joint Communique provided for, among other things, "joint, parallel patrolling at the border of both countries, thereby joining forces in the battle against illegal trafficking of persons, vehicles, contraband of any nature and joint operations, following the exchange of information and planning carried out by both parties." The Joint Communique formalized the practice that was already conducted informally, whereby from time to time between Nicaragua and Costa Rica (between the Nicaraguan Army and Costa Rica's *Guardia Civil*), Nicaragua planning and authorizing the development of joint security activities on the San Juan River. The *Guardia Civil* was never authorized by Nicaragua to engage in law enforcement activities on the river other than in joint operations with the Nicaraguan Army. It never did so.

SIXTH: There were no problems with the *Guardia Civil*, or with Costa Rican private vessel operators, until the middle of nineteen ninety-eight. Until then, the Nicaraguan Army regulated commercial and personal traffic on the San Juan River through its registration and departure clearance certificate, and the occasional authorization for the *Guardia Civil* to use the river to supply its border posts, and to engage in joint parallel operations with the Nicaraguan Army, without any incident.

SEVENTH: This collaborative situation came to an end in July nineteen ninety-eight.

EIGHTH: The impetus for the problem arose in May nineteen ninety-eight, when the newly-elected government of President Miguel Angel Rodríguez took office in Costa Rica. President Rodríguez and his Minister of Public Security, Juan Rafael Lizano, attempted to implement a new Costa Rican policy on the San Juan River, which changed the harmonious collaboration that existed with the two preceding Costa Rican governments (of Presidents Rafael Calderón and José Figueres, respectively). Under President Miguel Ángel Rodríguez's new policy, the *Guardia Civil* would no longer seek authorization from Nicaragua to navigate on the San Juan River, and would no longer comply with the measures announced in the Cuadro-Castro Communique, referred to above. Further, President Rodríguez and his Public Security Minister authorized the *Guardia Civil* of Costa Rica to send its vessels with armed *Guardia Civil* personnel onto the San Juan to intercept, register, and detain Nicaraguans suspected of illegally entering into Costa Rica. During June and July nineteen ninety-eight, the *Guardia Civil* carried out this policy and sent its vessels and officers, fully armed, on the river.

NINTH: The Nicaraguan Army, by way of its officials located in the area, vigorously protested these activities as a violation of its sovereignty, and insisted that the *Guardia Civil* should desist from them. The *Guardia Civil* refused, acting presumably on orders from the Minister of Public Security, and asserted that it would continue to intercept and detain Nicaraguans navigating on the river who were suspected of preparing to enter Costa Rica illegally. Faced with this attitude by the *Guardia Civil*, Nicaragua took the decision to prohibit all navigation on the San Juan River by *Guardia Civil* vessels. This decision was made in a meeting at the highest level of the Government of Nicaragua, by the President of the Republic, in which the affiant participated. The Presidential decision was communicated by the Regional Military Commander, Colonel Francisco Talavera, to the regional commander of the *Guardia Civil* on fourteen July nineteen ninety-eight.

TENTH: In July nineteen ninety-eight, the President of the Republic, Arnoldo Alemán, along with the Costa Rican President, agreed to a meeting, the former sending a delegation to San José to meet with the Costa Rican Minister of Public Security, Juan Rafael Lizano, and high ranking members of the Costa Rican *Guardia Civil*. The meeting took place in the aerial section of the Costa Rican *Guardia Civil* in the Juan Santamaría, Costa Rica. As Army Chief of Staff, I led the Nicaraguan delegation. Our instructions were to reach an agreement with the Costa Ricans and return to the situation of harmonious cooperation in conformity with the Joint Communiqué subscribed between the General of the Nicaraguan Army, Joaquín Cuadra, and the Minister of Security, Juan Diego Castro Fernández, which existed before President Rodríguez assumed power. On the other hand, the Nicaraguan delegation, knowing Costa Rica's pretensions desiring to supply her border posts located on her territory to the south of the right bank of the San Juan River, found itself having a better disposition to cooperate so long as (i) Costa Rica would request authorization, and Nicaragua would give it subject to the conditions that prevailed previously, for voyages to supply border posts; (ii) the *Guardia Civil* would not navigate on the river armed, without prior authorization from the Nicaraguan Army, and would not interfere with Nicaraguans navigating on the river. The Nicaraguan delegation transmitted this message to the Costa Ricans and their disposition to return to the situation where both countries worked successfully for over five years prior to the Costa Rican Minister of Public Security's position. The Costa Rican delegation, led by the Minister of Public Security, refused this offer. They insisted on a right to navigation on the river and to intercept suspected illegal immigrants. None of these rights were claimed by Costa Rica prior to May nineteen ninety-eight. Nicaragua's response was that Costa Rica has no such rights, that Nicaragua alone has sovereignty over the San Juan River, and that Costa Rica's pretended rights would offend Nicaragua's sovereignty. The meeting ended without agreement.

ELEVENTH: In July two thousand, five months after I became Commander of the Nicaraguan Army, I received a delegation of Costa Rican officials, led by the (then) Minister of Public Security, Rogelio Ramos Martínez, who wished to discuss the manner by which to resume navigation on the San Juan River by vessels of the *Guardia Civil*. The meeting was held on twenty-one July two thousand, in the port city of San Juan del Sur, on Nicaragua's Pacific Coast. The Costa Rican delegation also included Colonel Walter Navarro Romero, Director General of the Public Force, and Colonel Carlos Alvarado Valverde, International Legal Advisor to the Ministries of Public Security and Foreign Relations. Accompanying me on behalf of Nicaragua were: Colonel Ricardo Wheelock Román, Head of the Center for Military History; Major Walner Molina Pérez, Deputy Legal Advisor to the Nicaraguan Army; and Dr. Cecile Saborío Coze, Secretary General of the Ministry of Foreign Relations. An aide-memoire of the meeting was prepared by Major Molina, who continues in active military service, with the rank of Lieutenant Colonel and the same position. I approved the aide-memoire, a copy of which is attached hereto.

TWELFTH: The aide-memoire contains a complete account of what was said at the meeting, I will only summarize here that: (1) the meeting was held at the request of the Costa Ricans for the purpose of seeking an agreement that would permit the *Guardia Civil* to resume its pre-July nineteen ninety-eight practice of navigating on the San Juan River, subject to prior authorization by Nicaragua, for the purposes of bringing supplies and relief personnel to its bases on the right bank of the river; (2) during the course of the meeting, Colonel Alvarado of Costa Rica began by stating accurately that, before nineteen ninety-eight, the *Guardia Civil* supplied its border posts via the San Juan River, subject to prior permission from the Army of Nicaragua, with their weapons placed on the floor of the vessel, and that the vessel stopped at each Nicaraguan Army post that it passed en route for review of the personnel and contents on the vessel; (3) that the Costa Rican delegation specifically requested that Nicaragua agree to return to that situation.

THIRTEENTH: As of the time of my retirement from military service, in February two thousand five, no agreement was reached with Costa Rica, concerning navigation on the San Juan River by vessels of the Costa Rican *Guardia Civil* with the objective of supplying the posts located on her territory, however, contact between the Nicaraguan Army and the Costa Rican *Guardia Civil* continued on issues of mutual interest, such as combating drug trafficking, international cooperation, and that related to security and defence. As expressed by the person appearing before me, and well instructed by Me, the Notary, about the purpose, value and legal transcendence of this act, of the General Clauses that assure its validity, of the Specifications involved, and of the stipulations, both explicit and implicit.- This writing was read to the person appearing before me, who finds it accurate, approves and ratifies it.- Signs it with me.- I GIVE FAITH to all the above stated. (f) Illegible (f) MOLINA. Notary.-

This occurred before me from the front of folio number fifty to the back of folio number fifty-three, from my present Protocol number twenty-one, that I have in the present year. The testimony by which the Declaration was made, covered three usable pages of sealed legal paper, which was signed, sealed, and dated, in the city of Managua, at ten thirty in the morning on the twenty fourth of June, two thousand eight.

Annex 1

AIDE-MEMOIRE

Meeting between the Commander-in-Chief of the Nicaraguan Army
and the Minister of Public Security of Costa Rica

DATE: July 21, 2000-07-22
TIME: 09:45 to 12:40
PLACE: "Naval Force House," San Juan del Sur, Rivas Province

PARTICIPATE: **Nicaraguan Delegation.**
Army General Javier Carrión McDonough
Commander-in-Chief of the Nicaraguan Army
Colonel Ricardo Wheelock Román.
Director of the Military History Center
Major Walner Molina Pérez
Deputy Director of Legal Counsel
Dr. Cecile Saborío Coze
Secretary General of Foreign Policy, Ministry of Foreign Affairs.

Costa Rican Delegation.
Rogelio Ramos Martínez
Minister of Public Security.
Colonel Walter Navarro Romero
Director General of Public Forces.
Colonel Carlos Alvarado Valverde
Director of International Legal Counsel
Ministry of Public Security and Ministry of Foreign Affairs

1. The meeting began with a greeting from Army General Javier Carrión to the Costa Rican delegation, followed by a summary of the relations that we have had on the San Juan River with the different Costa Rican authorities with whom we have worked over the past ten years, where, on the part of the Nicaraguan Army, there has always been a relationship of common

understanding, at the same time granting, expeditiously and with a fraternal spirit, verbal permission and authorization for navigation on the river to supply and relieve the personnel assigned to your country's border posts at Sarapiquí and El Delta. The abuse of such permission led us to prohibit navigation over the San Juan River, when you began to patrol the river to intercept illegal immigration and demand rights claimed by Minister Lizano, but which our Highest Authority has stated that you do not have. The result of Minister Lizano's attitude was that the National Assembly became involved in the matter, declaring the Lizano-Cuadra press release null and converting this affair into a high priority issue in the national press.

President Arnoldo Alemán designated me to prepare a mechanism that will allow you to navigate over the San Juan River in accordance with the Constitution of Nicaragua, a mechanism that will subsequently be reviewed and approved by the President of the Republic and established by law in the National Assembly. I can not sign anything that authorizes navigation over the San Juan River beyond the context imposed by the Constitution of Nicaragua of regulating foreign military presence within our territory.

2. The Minister of Public Security of Costa Rica expressed gratitude for the welcome, affirming that there is indeed a relationship of great fraternity and understanding between the different posts of the Costa Rican Border Police and the members of the Nicaraguan Army. We understand your situation in prohibiting navigation on the San Juan River, it is an issue that goes beyond your control due to the level reached by the events. I hope that you also understand our situation and our urgent need to supply and relieve border post personnel. We change personnel at the posts every fifteen days, generally, we have two or at most three police officers per post, the supply and relief of the police officers by land becomes very difficult during the rainy season, thus the need to do so via the San Juan River. We fully recognize Nicaragua's sovereignty over the river; that we do not question.

   The letters exchanged by the presidents manifested the political will that an agreement be reached to resolve this problem. In this sense, I am not clear about the legislative procedure to which you referred, or about how to return to the status quo from before 1998.

   - At this time, Colonel Alvarado intervened to state that prior to 1998, [Costa Rica] supplied its posts from Bocas de San Carlos to El Delta, that the police navigated with their M-16 weapons stored on the bottom of the vessels (this is not armed navigation but rather navigation with arms) with prior permission from the Nicaraguan

> Army, which also verified the personnel and contents of the vessels at each post that the boat passed. We are not challenging Nicaragua's sovereignty, but Costa Rica has certain rights. When we carried out the supply and relief of personnel, we provided notice at each of your posts.

The verbal permission that we granted was framed within a good neighbor policy, Army General Carrión stated, we did not sign any agreement to establish this practice, nor was it framed within any existing Treaty. The only thing we signed was the Joint Communiqué of 1995, in which we agreed to joint patrols parallel to the border and we committed to fighting against the illegal trafficking of persons, vehicles and contraband of all types and to the exchange of operational information. We have always maintained routine control over the San Juan River in terms of migration, navigation, crews, vessels, vessel documentation, tourists, etc.

The navigation of your Border Police via the San Juan River became a topic of high national sensitivity. Therefore, today we must think more about a new mechanism than about the status quo prior to 1998, when you clearly knew that, in order to navigate the San Juan River, you had to ask permission, which was always verbal and was granted only in the sector Boca del Sarapiquí to El Delta. To believe that now you are going to navigate from Boca de San Carlos, where you have never done it, is to misunderstand the new reality in which we are found. Nicaragua's Constitution stipulates that any foreign military presence with humanitarian purposes must be authorized by the National Assembly by means of a law (which follows the normal procedures for all laws), and the Nicaraguan Army is responsible for the operational execution of this military presence by means of a document signed by the military parties, as we do for the New Horizons maneuvers with the United States of America, or with France, or with other countries. Therefore, the navigation of your Border Police must fall under the normality of what Nicaragua has been doing in recent years. The Letter of the Presidents is a good road to start. It is a political plan, but we must be careful. I am absolutely subject to what is stipulated by the Political Constitution of Nicaragua. Otherwise, the National Assembly can relieve me of my duty.

3. Minister Ramos asks if it is they who must request permission from the National Assembly of Nicaragua. If this is the case, it would be very difficult to do, because Costa Rican public opinion would condemnit for relinquishing sovereignty that by right is theirs. A law and the implementation of a mechanism were not the intention of the Presidents. The issue of asking permission would seem like the abandonment of a right that the people of

Costa Rica perceive as theirs. It would not be well received in the national forum.

- Álvarez intervenes to state that they have always navigated over the San Juan River, have supplied their posts, and that, by the Jerez-Canas Treaty and Cleveland Award, have a right to the Defense of the River, which they carry out from their border posts.

4. What we intend, responds Army General Javier Carrión, is to end the problem and establish a new relationship that definitively resolves the problem of the navigation of your Border Police on the San Juan River. The word **agreement** is not included in the Presidents' communiqué; it only mentions the status quo prior to 1998, which means that [Costa Rican Border Police] always navigated with our permission. We decided whether there was passage or not, and we exercised all of the controls I referred to earlier, as you well know. Written permission to navigate never existed. This problem must be removed from the Treaties, and a law must be made that will allow for the permanent supply and relief of your border post forces. The only viable way to do this today is that the National Assembly enact a law that enables us to prepare a mechanism, which may contain:

   - Sector of the San Juan River over which the mechanism shall be applied.
   - Presentation of the forms for navigation over the river.
   - Trimesterly planning of the dates of supply and relief actions
   - Procedures for application of the mechanism
   - Trimesterly and semi-annual review of the supply and relief mechanism

   [General Carrión] explains the procedure for the preparation of the law and how the Army has done so in the cases of the United States of America, France and all countries that came after Mitch. It remains clear that the permission is requested to the Nicaraguan Army. He offers to send one of the laws issued by the National Assembly for their perusal. It may seem to you that the proposed procedure is very long, but it is more certain to provide a solution to the problem, which is the intention of both Presidents. In addition, its approval will not take too long.

5. The Minister of Security states that finding an agreement under this framework is new to him, that he will report it to President Rodríguez and that, for their part, there is a positive willingness to advance toward the solution of the stated problem, since he was tasked by President Rodríguez to collaborate with the authorities of the Nicaraguan Army.

6. It is agreed that at the next meeting the Nicaraguan Army will present the mechanism for implementation of the Law to be approved by the National Assembly for the supply and relief of the border posts at Boca de Sarapiquí and El Delta. The meeting place will be made known at a later date by the Costa Rican authorities, and will be held in Liberia on August 18 of this year.

- Another issue covered was the experience of the Ministry of Public Security in the implementation of the anti-drug Treaty with the United States of America. To date, more than 300 boardings have been carried out. Minister Rogelio Ramos was invited to participate in a patrol with officers and sailors of the Nicaraguan Navy.

- The Minister of Public Security of Costa Rica explained how the Border Police are organized. The northern border area has one headquarters located in Liberia and is divided into different sections/zones covered from the central Headquarters. Similarly, the southern border area also has only one Headquarters.

- It remained clear that for them the problem **of permission** was a very important and sensitive element. At the end of the meeting, they expressed that this issue would remain pending.

Annex 69

AFFIDAVIT OF LIEUTENANT COLONEL
JUAN BOSCO CENTENO AROSTEGUI,
9 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER THIRTEEN - NOTARIAL CERTIFICATE. In the Archipelago of Solentiname, District of the San Carlos Municipality, San Juan River Province, at ten in the morning on the ninth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ**, Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **JUAN BOSCO CENTENO AROSTEGUI**, stands before me and in his own name, with identity card number 001-170253-0009P, of age, married, retired from military service, and domiciled at the Solentiname Archipelago, Guabo farm, San Juan River Province. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of the Republic of Nicaragua, born in the city of Managua on the sixteenth of February, 1953. I am presently retired, and living in the Solentiname Archipelago, San Juan River Province. I served as an active military agent during the period between 1979 and 1991 as an officer of the Army of the Republic of Nicaragua.

Second: From July to December 1979, and from the beginning of 1982 to June 1991, I served as Commander of the currently named Southern Military Detachment, which includes the entire San Juan River. While the name of the military base evolved during my tenure, my position as Commander remained the same. In 1979, the base was named "Special Zone IV," then it was named "Border Detachment Iván Montenegro Báez" upon my return in 1982, and later the "55th Brigade of Military Region V." The current name of the Southern Military Detachment was established after my retirement from the military.

Third: During these periods in 1979, and from 1982 to 1991, the Nicaraguan army was responsible, as it continues to be today, for securing Nicaragua's borders, and the detachment that I commanded was responsible for securing the San Juan River, part of which borders Costa Rica; and the troops under my command regularly patrolled the San Juan River and monitored all traffic on the river. During the periods that I was the Commander of the Military Detachment for this zone, there was very little civilian traffic on the San Juan River. The river had been a war zone in the 1970's, during the armed confrontation that led to the overthrow of the dictatorship of General Anastasio Somoza Debayle in July 1979. As a result, during the second half of the 1970's especially, the river was unsafe for normal civilian traffic, and navigation on the river, whether for commercial or other purposes, was extremely uncommon.

Fourth: For some time, after the triumph of the revolutionary forces and my arrival as Commander in July 1979, the region remained insecure. During that period, there was some commercial navigation on the river, but not very much. There was no international trade, only local trade between settlements on the river like San Juan del Norte in Nicaragua and Barra del Colorado or Puerto Viejo de Sarapiquí in Costa Rica. There were no customs posts on the Costa Rican side of the river. The local river trade consisted principally of the transport of coconuts and lobster from San Juan del Norte to Barra del Colorado. There was also some transport of merchandise between Puerto Viejo de Sarapiquí and Barra del Colorado and San Juan del Norte, mainly for supplying *pulperias* ["Mom and Pop stores"] in Barra and San Juan. The local traders who transported these goods, both Nicaraguans and Costa Ricans, operated their small boats freely along the river. There were no tourist excursions at that time. There were infrequent visits to the San Juan by Costa Rican officials aboard their own vessels. They reported their presence to the Nicaraguan army posts, and were given verbal authorization before they navigated in what they recognized were Nicaraguan waters. By 1982, when I returned to the region as Commander of the Southern Military Detachment, it had become a war zone again. Counter-revolutionary forces ("*contras*") had organized in Northern Costa Rica, along the right bank of the San Juan River, and they made frequent attacks and forays across it. The river was unsafe for navigation for the rest of the 1980's, until the fighting ended in 1990 and the counterrevolutionary forces were fully demobilized in 1991. The *contras* fired at all our vessels that navigated the river and tried to sink them, and we did the same to all the vessels that we believed were theirs or were bringing them supplies. For security reasons, army patrols on the river stopped, inspected and searched all boats that they encountered, whether the boatman and any passengers were Nicaraguan, Costa Rican or of another nationality. If the patrols were satisfied that the activity was legitimate and unconnected to the *contras*, they did not interfere. We encountered a few tourism excursions in 1982, but not thereafter. Nor was trade conducted via the river after 1982. If there were any local trade, it would have been very minimal, given the great danger to which the boatmen were exposed if they were mistaken for an enemy by the contending military forces. There was definitely no trade with San Juan del Norte, which was isolated and incapable of obtaining supplies. As a result, the entire population abandoned the town, mainly moving north along Nicaragua's Atlantic Coast, in some cases as far as the border with Honduras. During the periods that I was Commander of the Military Detachment responsible for the San Juan River, Costa Rica maintained two police posts on her side of the river, at Boca San Carlos (where the San Carlos River joins the San Juan) and farther away at Boca Sarapiquí (where the Sarapiquí River joins the San Juan). These small posts had only a couple of policemen. They were supplied, and the policemen were periodically relieved, either by river transport from within Costa Rica (via the San Carlos River or the Sarapiquí River) or by road. These police posts were not supplied or relieved by traversing the San

Juan River. Nor did the Costa Rican police patrol the San Juan or carry out any police functions on the river during either of the periods when I served as Nicaragua's military commander. According to our military intelligence, the Costa Rican security forces openly collaborated with the *contras* in northern Costa Rica, including along the banks of the San Juan, but they did not themselves venture into the river during this time.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the reverse of folio number twelve to the front of folio number fourteen, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on two pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at ten in the morning of the tenth of March, 2008.

Annex 70

AFFIDAVIT OF CAPTAIN MARIO GARCÍA LÓPEZ, 9 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER FOURTEEN - NOTARIAL CERTIFICATE. In the city of San Carlos, San Juan River Province, at eleven in the morning on the ninth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **MARIO GARCIA LOPEZ,** stands before me and in his own name, with identity card number 408-130965-0000E, of age, married, in military service, and domiciled at the border post at Sarapiquí, Municipality of San Juan de Nicaragua, San Juan River Province, and in transit in this city. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of Nicaragua, born in Masatepe, Masaya Province, the thirteenth of September, 1965. I am a Captain in the Army of Nicaragua, I have held this rank since September 2002. I am currently the Chief of the Second Border Sector of the San Juan River, responsible for overseeing the military posts along the San Juan River from Boca de San Carlos to the border post at San Juan de Nicaragua. My area of responsibility covers the military posts at Boca San Carlos, Sarapiquí, Delta, and San Juan de Nicaragua, all of which, except San Juan de Nicaragua, are located in front of the Costa Rican Civil Guard posts. I have held this position from January to July 2006 and from January of this year until the present date.

Second: Since I assumed this position, the Costa Rican Civil Guard has not navigated on the San Juan River. The Civil Guard has not used the river to supply their posts, as they did from time to time in the past as a result of the authorization Nicaragua gave them for that use. Since that practice ended, the Civil Guard has been supplying its posts located to the south of the right margin of the river by land and by interior rivers. All of the Costa Rican posts are accessible by road, including roads that Costa Rica has built in the past few years. The Costa Rican post at Delta is supplied by boat from Barra del Colorado using the Colorado River which is entirely in Costa Rican territory.

Third: All police powers and authority on the river are exercised by Nicaragua, and particularly by the Nicaraguan Army and various agencies the State has positioned in the border posts. Nicaraguan army vessels carry out regular patrols, as do the park rangers of the Ministry of the Environment and Natural Resources. There is very little private traffic on the San Juan River. There are a few Nicaraguans and Costa Ricans who transport goods between different settlements on the river. They operate their own small boats. There is also navigation by the Costa Ricans who reside in Costa Rica on the bank of the river, also in their own small boats. They travel between points close to the river in Costa Rican territory for their own private purposes. There is a passenger transport service between the Nicaraguan towns of San Carlos on Lake Nicaragua and San Juan de Nicaragua on the Caribbean Sea (Atlantic Ocean). Without a doubt, the main use of the river by private vessels is for tourism. There are also Nicaraguan boats that carry passengers from San Carlos or El Castillo, located on the portion of the river where both banks belong to Nicaragua, to San Juan del Norte or intermediate points on the lower portion of the river where the right bank forms the border. The vast majority of the tourist boats that navigate the San Juan River are Costa Rican. They navigate primarily traveling between the Costa Rican towns of Puerto Viejo, on the Sarapiquí River, and Barra del Colorado, on the Colorado River, to Tortuguero, on Costa Rica's Atlantic Coast. This necessarily involves traversing the San Juan River between Boca de Sarapiquí and Delta.

Fourth: With the exception of the local Costa Rican residents, all of these boats are required to obtain Nicaraguan departure clearance certificates before they may navigate on the San Juan River. This includes boats operated by Nicaraguans. The departure clearance certificate certifies that the boat has been inspected, and that it meets all Nicaraguan safety requirements for navigation on the river. The inspection is carried out by Nicaraguan Army personnel and is conducted at the first point of entry onto the San Juan River. The boat operator is required to pay a fee of US $5 for this service. All boats must also identify their passengers and any cargo that they are carrying. This is a security measure designed to ensure that there is no illegal trafficking of persons or goods on the river, and to ensure that no one who enters and exits the river has entered the Indio Maíz Biological Reserve, located on the northern bank of the river's course, where access is not allowed. These boats must report at each Nicaraguan military post that they pass while traversing the river.

Fifth: All tourist boats entering the San Juan River from Costa Rica must also register their passengers with Nicaraguan immigration authorities at their point of entry onto the San Juan River. As at all immigration entry points in Nicaragua, the tourist's information is registered at the post. This measure is particularly important on the river due to the need to protect against any illegal entry into the Indio Maíz Biological Reserve. Upon registry, the tourist is provided a tourist card for US $5 and pays an immigration processing fee of US $2, as is required at all Nicaraguan immigration entry facilities. The great majority of tourists are citizens of nations listed as Immigration Category A, which are not required to present a consular visa to enter Nicaragua. However, if a tourist happens to be from a country where Nicaragua requires a consular visa, the tourist will have to have a visa to enter Nicaraguan territory.

Sixth: Nicaragua does not require the Costa Rican residents along the river to have their boats inspected, or to pay a fee for a departure clearance certificate, or to register with Nicaraguan immigration, or to have a consular visa when they navigate on the San Juan River. If a resident passes a military post, he is required to simply notify the post of his passage. All local residents are provided a courtesy departure certificate for their regular use of the river, which is valid for one month and is permanently renewable.

Seventh: During my tenure, there have been primarily three boatmen who use the river to transport goods, two of whom are Costa Rican nationals. Both of the Costa Ricans are residents of the community of La Tigra, on the Costa Rican side of the river, between Boca de Sarapiquí and Delta. One of them sells boat fuel at La Tigra, which he obtains from Puerto Viejo up the Sarapiquí River. He travels on the San Juan River the short distance of 15 km, between La Tigra and Boca de Sarapiquí, on his route to Puerto Viejo. The other Costa Rican. Carlos Rugama, owns a small grocery store in La Tigra, and he too navigates the San Juan and the Sarapiquí Rivers to obtain his supplies at Puerto Viejo. The Nicaraguan boatman, Rigoberto Acevedo, delivers commodities and other household supplies from Puerto Viejo to San Juan de Nicaragua. Both Costa Rican boatmen have been provided courtesy departure clearance certificates, since they are residents of the river. They are not required to pass through Nicaraguan customs or to have a Nicaraguan visa.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Lopez (f) Molina.

This occurred before me from the front of folio number fourteen to the reverse of folio number fifteen, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on two pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at eleven in the morning of the tenth of March, 2008.

Annex 71

AFFIDAVIT OF MARTIN ANTONIO JARQUÍN LÓPEZ, 4 JUNE 2008

AFFIDAVIT DOCUMENT NUMBER TWENTY-EIGHT, NOTARY DECLARATION. In the city of Managua, Department of Managua. At eleven in the morning, on the fourth (4) of June of two thousand eight (2008). Before Me, **WALNER ABRAHAM MOLINA PEREZ**, Attorney and Notary Public of the Republic of Nicaragua, of this domicile and residence, duly authorized by the Honorable Supreme Court of Justice to exercise the profession of Notary during a five-year period that expires on the fifteenth (15) of April of two thousand thirteen (2013), there appears Mr. **MARTIN ANTONIO JARQUIN LOPEZ**, of legal age, married, an official of the Directorate General of Immigration and Alien Services of the Ministry of Government of the Republic of Nicaragua, of this domicile, who identifies himself with Identity Card number four, eight, one, hyphen, two, zero, one, one, six, zero, hyphen, zero, zero, zero, zero, letter E (481-201160-0000E). I ATTEST that the appearing party is personally known by me and has the necessary legal capacity to bind himself and enter into agreements, especially for executing this instrument, in which he DECLARES as follows:

FIRST: That he is a Nicaraguan citizen and presently holds the position of Border Director at the Directorate General of Immigration and Alien Services of the Ministry of Government of the Republic of Nicaragua with the rank of Captain and has been an officer in that Directorate for twenty-five (25) years.

SECOND: That to regulate all migratory activities in the national territory, a broad legal framework exists in Nicaragua, including specialized legal regulations, such as Nationality Law, Law No. 149 (one hundred forty-nine); Immigration Law, Law No. 153 (one hundred fifty-three), Alien Status Law, Law No. 154 (one hundred fifty-four), Illegal Immigration Trafficking Control Law, Law No. 240 (two hundred and forty) and Immigration Incentive Law, Law No. 250 (two hundred and fifty), among others. All these, as well as other internal provisions, grant great importance to the migratory control that should be provided by the immigration posts to foreigners entering the Nicaraguan territory through any international border post operating in the country. In this regard, the Immigration Law, published in the official daily La Gaceta No. 80 (eighty) on the thirtieth (30) of April of nineteen ninety-three (1993), grants to the immigration posts the power to authorize the entry, exclusion, deportation or expulsion from the national territory of any foreign citizen who attempts to enter the country. The registration made by the person in charge of the immigration dispatch, as well as the certificate issued is vitally important for any immigration changes to be made at the Central Offices of the Directorate General of Immigration and Alien Services in Managua. Further, he states that these immigration records were provided by the Directorate of Immigration and Alien Services located at the Sarapiquí post, which keeps them under its custody and form part of an ordinary process that is practiced in all border posts of the country, whereby the Directorate of Immigration and Alien Services keeps a record of all persons entering Nicaragua. In that sense, each record details the foreigner's first name and surname, nationality, passport number, date of birth and occupation, as well as the date of entry and date of departure from the immigration border post and the address in Nicaragua to which they are traveling. This is a procedure carried out by all immigration offices for international entry and departure to and from Nicaragua.

THIRD: From the date that immigration posts were established in the localities of Sarapiquí, Boca de San Carlos, Delta and San Juan de Nicaragua, all located on the San Juan River, department of Río San Juan, books and immigration control cards were provided, which books, as a rule, must be kept by the immigration control posts that lack computerized systems and must be subsequently transferred to the central office of Immigration in the city of Managua, where the data is entered in a central computer system for the registration and control of foreigners and nationals entering or leaving the national territory. The post located in Sarapiquí is the border post through which tourists entering the San Juan River traveling with Costa Rican companies pass; almost all tourist excursions from Costa Rica entering or leaving the river pass by the Sarapiquí post in route to the Sarapiquí river that connects the interior of Costa Rica with the border.

FOURTH: These registration books are provisionally safeguarded in each immigration control post and are subsequently transferred to the central Immigration registry in the city of Managua to be archived.

FIFTH: Said books record all immigration movements and the detailed information of each tourist, making it possible to identify the number of tourists who passed through the Sarapiquí immigration post. That he inserts in this statement, as an example, pages number zero six eight (068) and zero six nine (069) of the entry book kept at the Sarapiquí post for the dates corresponding to September twenty-second (22) through twenty-fourth (24) of the year two thousand (2000). In order to determine the number and nationality of the tourists who were registered at the Sarapiquí post, these registrations were counted, providing the following data: In nineteen ninety-seven (1997), two hundred thirty (230) Americans, one hundred seventy-six (176) Germans, five (5) French, thirty-nine (39) Costa Ricans, fourteen (14) Spaniards, twenty-one (21) Canadians, six (6) Italians, nineteen (19) English and ninety-three (93) other nationalities were registered for a total of six hundred three citizens (603); in nineteen ninety-eight (1998), the entry of two hundred thirty (230) Americans, one hundred eleven (111) Germans, twelve (12) French, one hundred twelve (112) Costa Ricans, ninety-nine (99) Spaniards, twenty-four (24) Canadians, five (5) Italians, fifty-eight (58) English and sixty (60) other nationalities was registered for a total of seven hundred eleven (711) citizens; in nineteen ninety-nine (1999), the entry of one hundred twenty-one (121) Americans, forty-nine (49) Germans, seven (7) French, one hundred sixty-two (162) Costa Ricans, two (2) Spaniards, fourteen (14) Canadians, three (3) Italians, twenty-four (24) English and eighty (80) other nationalities was registered for a total of four hundred sixty-two (462); in the year two thousand (2000), the entry of five hundred seventy-six (576) Americans, one hundred ten (110) Germans, forty-one (41) French, two hundred seventy (270) Costa Ricans, two hundred seventy-five (275) Spaniards, one hundred forty-eight (148) Canadians, thirty-three (33) Italians, ninety-nine (99) English and two hundred ninety-one (291) other nationalities was registered for a total of one thousand eight hundred forty-three (1,843) citizens; in the year two thousand two (2002), the entry of eight hundred sixty-eight (868) Americans, one hundred eighty-two (182) Germans, one hundred five (105) French, four hundred fourteen (414) Costa Ricans, one hundred thirty-three (133) Spaniards, one hundred one (101) Canadians, forty-nine (49) Italians, one hundred eighty-four (184) English and three hundred sixty-nine (369) other nationalities was registered for a total of two thousand four hundred five (2,405) citizens; in the year two thousand three (2003), the entry of one thousand one hundred seventy-seven (1,177) Americans, one hundred thirty-nine (139) Germans, two hundred fourteen (214) French, three hundred thirty-six (336) Costa Ricans, one hundred sixty-eight (168) Spaniards, one hundred thirty-three (133) Canadians, one hundred forty-four (144) Italians, three hundred fifty-seven (357) English and six hundred twelve (612) other nationalities was registered for a total of three thousand two hundred eighty (3,280) citizens; and in the year two thousand four (2004), the entry of nine hundred seventy-six (976) Americans, one hundred twenty-five (125) Germans, two hundred thirty-one (231) French, one hundred forty-four (144) Costa Ricans, one hundred three (103) Spaniards, one hundred twenty-one (121) Canadians, one hundred eighteen (118) Italians, four hundred eighteen (418) English and three hundred fifty-four (354) other nationalities was registered for a total of two thousand five hundred ninety (2,590) citizens. Having stated the foregoing, the appearing party was advised by me of the scope, value and legal transcendence of this act, the general clauses that guarantee the validity of this instrument, and the special clauses that involve waivers and implicit and explicit stipulations. I read the entire document to the appearing party, who states its concurrence, approves, ratifies and signs with me. I ATTEST to all related matters. /s/ Illegible /s/ Molina.

Copied before me from the front of page number forty-eight to the front of page number fifty of my Protocol number twenty-one kept for this year. I issue this first certified copy of the Affidavit on two stamped legal sheets, which I sign, seal and rubricate in the city of Managua, at ten thirty in the morning, on the fifth of June of two thousand and eight.

Annex 72

AFFIDAVIT OF BRIGADIER GENERAL
CÉSAR OVIDIO LARGAESPADA PALLAVICINI,
9 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER FIFTEEN - NOTARIAL CERTIFICATE. In the city of Managua, at four in the evening on the ninth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ**, Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **CESAR OVIDIO LARGAESPADA PALLAVICINI**, stands before me and in his own name, with identity card number 001-060756-0003A, of age, married, in military service, and domiciled in the city of Managua, Municipality of Managua. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of Nicaragua. I was born in Managua on the sixth of July, 1956. I am a Brigadier General in the Army of Nicaragua. I have held this rank since 2006. I am currently the Auditor General of the Army of Nicaragua. I have been in this position since 2002.

Second: From the 4th of January 1996 until the 28th of October 1997, I was Chief of the South Military Detachment, with headquarters in San Carlos, at the source of the San Juan River. The South Military Detachment was responsible for security and border protection in the San Juan River Province, including the San Juan River and the national park known as the Indio Maíz Biological Reserve. To assure security, border protection, navigation safety and environmental protection the army maintained eight posts along the San Juan River. Of these, four were located in Nicaraguan territory in the area where the right bank of the San Juan River forms the border with Costa Rica. These were in Boca San Carlos, Boca de Sarapiquí, Delta and San Juan del Norte.

Third: The policing of the San Juan River, including the part of the river where the right bank belongs to Nicaragua, has been the responsibility solely of Nicaragua, since Nicaragua alone is sovereign over the river, and Nicaragua alone has exercised police power over it. This function has been carried out by the personnel stationed at the posts mentioned in the previous paragraph, who regularly patrolled their assigned sections of the river in motorized patrol boats. Costa Rican security personnel, belonging to the *Guardia Civil*, were stationed in Costa Rican territory in front of the Nicaraguan posts at Boca San Carlos, Boca de Sarapiquí and Delta, but their area of jurisdiction was only on land, and on the rivers internal to Costa Rica, namely, the San Carlos, the Sarapiquí and the Colorado Rivers. The *Guardia Civil* had no jurisdiction, nor has it exercised police responsibilities, with respect to the San Juan River.

Fourth: Relations between the Nicaraguan and Costa Rican security personnel stationed along the San Juan River were generally excellent during the time I served as Chief of the Military Detachment. Periodically, the Nicaraguan post commanders would meet with their Costa Rican counterparts, either at the Nicaraguan or the Costa Rican post, and exchange information on criminal activity.

Fifth: My headquarters also authorized the *Guardia Civil* to navigate on the river, in their own vessels, for the purpose of bringing supplies to their posts at Boca San Carlos, Boca de Sarapiquí and Delta. These trips were made on average once every month. The procedure was as follows: the *Guardia Civil* requested authorization to make a particular trip for the purpose of bringing supplies to particular posts on a particular date; authorization would be given by Nicaragua, and the *Guardia Civil* vessel would begin its journey by reporting to the Nicaraguan post across the river; a Nicaraguan sergeant would board the vessel and would accompany them on their itinerary on the San Juan River; the *Guardia Civil* personnel were not permitted to travel armed, so their rifles were placed on the floor of the vessel and the Nicaraguan sergeant made sure that they stayed there while the vessel was in Nicaraguan waters. No departure clearance certificate was required and no fees were charged by Nicaragua. During this period, Costa Rica was engaged in constructing and improving roads connecting all of her posts on the San Juan River so that supplying and relieving the personnel at these posts could be conducted by land transport instead of by the river.

Sixth: On certain occasions, other Costa Rican officials – not belonging to the *Guardia Civil* – requested permission to navigate the San Juan River, among them, officials from the Social Security Agency of Costa Rica and the Ministry of Education. This was also the case for non-governmental organizations, like the Costa Rican Red Cross, which brought medicines to the local river communities, or transported the sick. These vessels followed the same procedure as in the case of the *Guardia Civil*: permission to navigate was requested in advance; authorization was given; the vessel reported to the Nicaraguan border posts and registered the passengers and crew; and it was allowed to navigate. As a courtesy, no departure clearance certificates were required and no fees were charged.

Seventh: Non-official traffic on the river was very limited. As San Juan del Norte, today San Juan de Nicaragua, gradually became repopulated (its entire population had abandoned the town during the civil war of the 1980's), a passenger service emerged connecting San Juan del Norte with San Carlos on the edge of Lake Nicaragua. This was operated by a Nicaraguan company. There was very little trade traffic on the river. The new residents of San Juan del Norte engaged in some minor commerce with Barra del Colorado, using the river, and there were occasional deliveries of basic supplies from Puerto Viejo de Sarapiquí to Barra del Colorado. But this kind of commercial traffic, carried on by small boats, was very infrequent. There was no truly international trade of any kind. There were no customs posts. There was a small number of boatmen, both Nicaraguan and Costa Rican, engaged in this commercial navigation. They were required to undergo a safety inspection and obtain a departure clearance certificate from the Nicaraguan military post nearest to their point of entry into Nicaraguan waters. The Costa Rican commercial boatmen, who were well known by the Nicaraguan authorities, were not required to pass through Nicaraguan immigration or to pay any fees in that regard. Nor were they required to obtain tourist cards. They navigated freely on the river.

Eighth: Apart from these shipments of articles of basic consumption, the river was also navigated by local Costa Ricans who lived in the communities in the Costa Rican territory near the river. These were very small hamlets with a total Costa Rican population of no more than a thousand people. Most were dedicated to cattle raising, which was the biggest industry and main source of employment on the Costa Rican side. They used the river to travel to work, or to a store to purchase supplies, for example. They traveled freely on the river. For safety and security purposes, they were required to report to the nearest Nicaraguan post on the river. But they were not required to undergo inspection of their vessels or obtain a departure clearance certificate, or to pass through Nicaraguan immigration or pay any fees or other charges. In emergencies, they could navigate the river at night. Otherwise, night travel on the river was prohibited because it was extremely dangerous. The river is full of fallen trees and other floating objects that cannot be seen in the dark. Also, the boats that operate along the river generally have no lights, so there is a serious risk of collisions.

Ninth: The most significant Costa Rican use of the river during the time I was Chief of the Southern Military Detachment was by Costa Rican boats conducting tourism excursions, carrying tourists from North America, Europe and Asia. The principal route began in Costa Rica at Puerto Viejo de Sarapiquí, where it takes approximately three hours by boat along the Sarapiquí River to get to its mouth at the San Juan River. From there, the tourist boats entered the San Juan River, continuing in an eastbound direction to Delta, where part of the San Juan River flows into the Colorado River. At that point, the boats left Nicaraguan waters and continued their journey inside Costa Rica down the Colorado or Barra del Colorado or Tortuguero until the coast of the Atlantic Ocean. In all cases, the tourist boats were required to stop at the Nicaraguan post at their point of entry onto the San Juan River, at Boca de Sarapiquí, in order to be inspected for safety purposes, to assure that the vessel carried a sufficient number of life vests and to confirm that boatman carried a valid Costa Rican operator's license. If these conditions were met, a departure clearance certificate, for which the boatman paid a fee of US$ 5, was issued allowing him to navigate the river. All tourists were required to purchase a tourist card for US$ 5, as they are at all points of entry into Nicaragua. Tourists were required to present passports, and those from countries where a visa is required to enter Nicaragua were also required to have a visa. In practice, this applied to very few tourists, since Nicaragua does not require visas from citizens of the United States, and the European Union countries, among others. Tourists were also required to be processed by Nicaraguan immigration officials stationed at the post, and to pay a fee of US$ 2 for this service, as well as a US$ 2 fee for the immigration services related to departing the country. When the vessel completed the San Juan River portion of its excursion, it stopped again at the Nicaraguan military post located at that point, at Delta, to register the tourists' departure and to assure that everyone who entered Nicaragua was exiting, and that none of them had been left behind in Nicaraguan territory. This was necessary as a security measure, to assure that there were no unauthorized entries into the protected area of the Indio Maíz Biological Reserve.

Tenth: Because the Indio Maíz Biological Reserve and the San Juan River are protected areas, inhabited by rare and endangered land and aquatic species, Nicaragua does not permit hunting or fishing in these areas. This prohibition applies to Nicaraguans as well as Costa Ricans. The Nicaraguan army enforces this prohibition. Anyone caught fishing on the river will be apprehended, and his boat and fishing tools are subject to seizure. The only exception is that Nicaragua does not interfere with Costa Ricans fishing from Costa Rican territory. That is, they are permitted to fish in the San Juan while they are on the right bank of the river.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the reverse of folio number fifteen to the reverse of folio number seventeen, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on three pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at eleven thirty in the morning of the tenth of March, 2008.

Annex 73

AFFIDAVIT OF BRIGADIER GENERAL
DENIS MEMBREÑO RIVAS,
10 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER SEVENTEEN - NOTARIAL CERTIFICATE. In the city of Managua, at eleven in the morning on the tenth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ**, Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **DENIS MEMBREÑO RIVAS**, stands before me and in his own name, with identity card number 281-160756-0007V, of age, married, in military service, and domiciled in the city of Managua, Municipality of Managua, Nicaragua. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of the Republic of Nicaragua. I was born in the city of Leon, on the sixteenth of July, 1956. I have been a member of the Army of the Republic of Nicaragua since 1979. I currently hold the rank of Brigade General, having been promoted to this position on the second of September, 2007. I am currently the Chief of the Defense Information Directorate.

Second: From 10 February 1992 until 31 December 1995, I served as Chief of the South Military Detachment, which had jurisdiction over the San Juan River Province, including the entire San Juan River. Headquarters for the Detachment was in San Carlos, in the southeast corner of Lake Nicaragua, at the source of the San Juan River. The South Military Detachment came into existence under my charge, in February 1992. Previously, the Department of Río San Juan was part of the Fifth Military Region, which also included the Departments of Boaco and Chontales. When I arrived at the Detachment at the beginning of 1994, the Nicaraguan army manned four military posts along the river, at Papaturro, Río Frio, Boca de Sábalos and Boca de Sarapiqui. The first two were not located on the San Juan River. The third was on the part of the river where both banks of the river belong to Nicaragua. The military post at Boca de Sarapiquí was directly in front of the post where the Sarapiquí River enters the San Juan. It was mainly from that Nicaraguan military post that, historically, Nicaragua monitored and controlled the navigation of the San Juan River by Costa Ricans, as well as by Nicaraguans, on the part of the river where the right margin constitutes the border between Nicaragua and Costa Rica. During my tenure as Chief of the Military Detachment, four more Nicaraguan military posts were established along the river, at El Castillo (where both banks belong to Nicaragua), and at Boca San Carlos and Delta, in front of the border, and San Juan del Norte (today San Juan de Nicaragua).

Third: In 1992, my first year as Chief of the South Military Detachment, life along the San Juan River was transitioning back to normal, after the long disruptions caused first by the Popular Revolution against the Somoza dictatorship in the 1970's and the counter-revolution of the 1980's, because the river was in the middle of a war zone and frequent military engagements. The town of San Juan del Norte, at the mouth of the San Juan River, had been abandoned by its population during the 1980's, and remained unpopulated during my entire tenure. There were no other Nicaraguan settlements on the left bank in front of Costa Rica, because the entire area is part of a national park, the Indio Maíz Grand Biological Reserve, where human settlement is prohibited in order to preserve the natural environment and the rich biological diversity that exists there. For this reason, there was no trade between Costa Rica and Nicaragua on the lower part of the river. Nor was there any external trade between Costa Rica or Nicaragua and any third countries. The only trade that was carried out on that part of the river was on the portion between the Sarapiquí River and the Colorado River, which was used infrequently by Costa Rican boatmen in small boats transporting supplies from Puerto Viejo de Sarapiquí in Costa Rica, down the Sarapiquí River to the San Juan, and then east along the San Juan River as far as the Colorado River (a distance of approximately 24 km.), where they reentered and navigated Costa Rican waters until their destination at Barra del Colorado on Costa Rica's Atlantic Coast. These were mainly engaged in the delivery of supplies to the small hotels that were springing up in the area to service Costa Rica's then-nascent tourism industry in the region.

Fourth: The right of Costa Rican vessels to transport goods along this portion of the San Juan River was fully respected. Upon entering the San Juan River, usually at Boca de Sarapiquí, vessels transporting goods were required to register at the closest Nicaraguan border post. A safety inspection was performed, and a departure clearance certificate, or *zarpe*, was issued; the fee for this service was US$ 5. The same procedure was followed with respect to Nicaraguan vessels navigating on this portion of the San Juan River. A similar procedure was utilized by Costa Rican authorities when Nicaraguan vessels entered Costa Rican waters, such as the Río Frío, the Sarapiquí and the Colorado; the Costa Rican authorities required Nicaraguan vessels to stop for inspection and obtain a departure clearance certificate before proceeding to navigate in Costa Rican waters.

Fifth: This requirement did not apply to the local Costa Rican residents. They were not required to have their boats inspected, or to pay a fee for a departure clearance certificate. When local residents passed a military post, they were required to simply notify the post of their passage. All local residents were provided a courtesy departure certificate for their regular use of the river, which was valid for one month and could be consecutively renewed.

Sixth: During my tenure as Chief of the Military Detachment, there was a significant increase in the frequency of navigation of the lower part of the San

Juan River by vessels carrying tourists. Some of the vessels were owned and operated by Nicaraguans, but the vast majority of them were Costa Rican. The principal route was from Puerto Viejo de Sarapiquí in Costa Rica up the Sarapiquí River to the San Juan River, then east along to San Juan River to the location known as Delta, where the Colorado River begins, and then down the Colorado (in Costa Rican waters) to Barra del Colorado or Tortuguero on the Costa Rican coast. Costa Rican tourist boats also traveled back from Tortuguero or Barra del Colorado to Puerto Viejo de Sarapiquí using the same portion of the San Juan River, only westbound instead of eastbound. Near the beginning of my tenure, no more than 10 tourists per month were transported along this route, one way or the other. However, by the time I left the Detachment at the end of 1995, the number increased to between approximately 200 and 700 tourists per month, depending on the season.

Seventh: This dramatic increase in traffic along the river raised several concerns for Nicaragua. First, as a sovereign State, Nicaragua needed to assure the safety and security of all transportation in its waters, including transportation by foreign vessels carrying foreign citizens. Second, Nicaragua had a need to assure that the fragile ecology of the Indio Maíz Grand Biological Reserve and the San Juan River were protected. To accomplish these objectives, Nicaragua not only required all tourist boats (including those owned and operated by Nicaraguans) to register at the closest military post to their point of entry of the river, and to undergo a safety inspection and obtain a departure clearance certificate; it also required all passengers and crews to carry valid passports, and all passengers to purchase Nicaraguan tourist cards for US$ 5 per passenger and to pass through Nicaraguan immigration on entering and exiting Nicaragua. These were the same requirements applied to all foreign citizens upon entering Nicaragua at any of its border posts. Initially, a US$ 2 fee was charged upon entering Nicaragua; later an addition US$ 2 was charged upon exiting national territory. Nicaragua required that all vessels report to the nearest military post when they left the San Juan River, as well as when they entered it. This was to assure that the full complement of passengers who entered Nicaragua were leaving, and that none had disembarked illegally in Nicaraguan territory, especially in the Biological Reserve.

Eighth: During my tenure, there were frequent attempts to enter the protected area to cut down rare trees and valuable hardwood and sneak the logs across the river to the Costa Rican side. There were also efforts by persons living on the Costa Rican bank of the river to cross over and hunt or capture protected wildlife in the national park, or to catch fish in the river. Working with Nicaraguan park rangers from the Ministry of Natural Resources and Environmental Protection, our soldiers did everything they could, despite limited resources, to prevent this activity, to arrest the perpetrators if caught in Nicaraguan territory, and to prosecute them. Because the San Juan River is part of the protected area, and some of its aquatic species are endangered, no fishing is allowed. Neither Nicaraguans nor Costa Ricans nor anyone else may fish in the river. If they are caught fishing illegally, their fish, fishing implements and boats are subject to seizure. The only exceptions are two specifically designated sport fishing zones, one at San Juan del Norte and one on the upper portion of the river where both banks belong to Nicaragua, where licensed sport fishing under strict limitations is permitted during certain periods of the year. The only other exception is for residents who live along the Costa Rican side of the river. They are permitted to fish from the shore. But they may not enter the river by boat and fish there.

Ninth: Local residents on the Costa Rican side of the river are free to navigate in their private vessels between points on the Costa Rican side. They are only required to report their movements on the river, for purposes of security and environmental protection. They are issued departure clearance certificates as a courtesy, for which they are not charged a fee. For the same reasons of security and environmental protection, navigation is not permitted after dark. This prohibition applies to everyone, Nicaraguans included. The river is treacherous to navigate at night, since there are no lights, and fallen logs and sand bars, invisible in the dark, are prevalent, as are crocodiles. By longstanding custom nighttime navigation of the river has not been practiced, except in emergency situations. Nicaragua authorizes such emergency use of the river at night. Otherwise, it is prohibited mainly for safety reasons. But the prohibition is also necessary for environmental protection, because it is during the night, when detection is most difficult, that the protected flora and fauna of the Indio Maíz Biological Reserve and the San Juan River are most vulnerable to poaching.

Tenth: From my first day at the South Military Detachment in February 1992 until my departure at the end of December 1995, our relations with the Costa Rican security personnel were very good. From time to time, my Detachment coordinated operations against crime with the *Guardia Civil*, where in a parallel manner we would travel the relevant sector of the border, them from their territory and us navigating the San Juan River. These efforts were primarily focused on the prevention of illegal activities or rescuing shipwreck victims. The Costa Rican security personnel never navigated on the river without first requesting authorization from my Detachment. During this period, I was requested by a *Guardia Civil* Commander at the border post at Los Chiles, Costa Rica, to authorize the *Guardia Civil* to navigate in their own vessels along the San Juan between their post at Boca de Sarapiquí and their posts at Delta (where the Colorado River begins) and Barra del Colorado to bring supplies and replacement personnel to those posts. The Costa Rican Commander explained that it would facilitate these supply and replacement operations if the *Guardia Civil* could do it by river, because the roads were not very good. I gave my permission for this practice. Prior to each of these operations, which occurred approximately once every month during my tenure at the Detachment, a *Guardia Civil* officer requested authorization to make the journey. I gave the authorization, and communicated it by radio to the Nicaraguan military post at Boca de Sarapiquí. The *Guardia Civil* vessel then reported to that post as it began its journey, and reported to the Nicaraguan post at Delta when it left Nicaraguan waters. At all times while navigating on the San Juan, the Costa Rican officers were prohibited from bearing arms; they were required to carry their arms on the floor of the boat. At some point, I began to require that a Nicaraguan soldier board the vessel at Boca de Sarapiquí and accompany it during its journey through the Nicaraguan river; he disembarked at Delta, when the vessel entered the Colorado River. Similarly, whenever a Nicaraguan Army vessel entered Costa Rican waters, either to attend meetings with *Guardia Civil* officers or as part of a joint operation, we were required by the Costa Ricans to request permission before entering their territory, and to place our arms on the floor of the vessel. We considered this a normal practice in deference to the State that exercises sovereignty over the waters.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to present the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the front of folio number twenty to the front of folio number twenty-three, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on three pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at three in the afternoon on the tenth of March, 2008.

Annex 74

AFFIDAVIT OF LIEUTENANT COLONEL WALNER ABRAHAM MOLINA PEREZ,

26 MAY 2008

AFFIDAVIT PUBLIC DOCUMENT NUMBER TWENTY-FIVE (25). NOTARY DECLARATION. In the city of San Carlos, Province of Río San Juan, at ten in the morning, on the twenty-sixth (26) of May of two thousand eight (2008). Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua and in transit through this city, duly authorized by the Honorable Supreme Court of Justice to exercise the profession of Notary during a five-year period that expires on the fifteenth (15) of April of two thousand thirteen (2013), by me and before me, **DECLARE** as follows:

FIRST: I am a citizen of the Republic of Nicaragua, holder of Identity Card number one, two, one, hyphen, two, three, zero, nine, five, three, hyphen, zero, zero, zero, zero, letter A **(121-230953-0000A)**. I was born in the city of Juigalpa, Province of Chontales, on the twenty-third (23) of September of nineteen and fifty-three (1953). I am a Lieutenant Colonel of the Army of Nicaragua. I presently hold the position of Second Chief of the Legal Advisory Department of the Army of Nicaragua. I have held this position since the year nineteen ninety-two (1992). In my capacity as Second Chief of the Legal Advisory Department of the Army of Nicaragua and as Lawyer and Notary Public, I issue this notary statement based on Article forty-three (43) of the Notary Law in force in Nicaragua. For this Statement, I examined two (2) Registries of Minutes on the Activities of the Southern Military Detachment of the Army of Nicaragua which were placed before me. The first, consisting of two hundred (200) pages, duly sealed with wax and identified by registration number CT-No. 02 (C-T-Number-zero-two), with a beginning date of the sixth (6) of February of nineteen ninety-six (1996) and closing date of the fourteenth (14) of September of nineteen ninety-seven (1997). The second consists of one hundred and three (103) pages, duly sealed with wax and identified by registration number CT- No. 12 (C-T-Number-one-two), with a beginning of twelve (12) of September nineteen ninety eight (1998) and a closing date of fourteen (14) September two thousand and two (2002). Said books were used by the Guard official on duty to annotate the activities, facts, reports and other relevant data, inter alia, the capture of criminals, invasions by squatters, seizure of wood and the operative situation of the Southern Military Detachment during that period. The aforementioned Minute Books are under the custody of the command post of said detachment and were facilitated to me for their inspection.

SECOND: From the aforesaid Minute Books, I noted the relevant parts concerning the activities carried out on the San Juan River in respect to criminal activities and the protection of the environment (against the illegal occupation of the protected zone, illegal hunting and fishing, and illegal woodcutting) to adopt prevention measures and preclude such acts and actions, and I prepared a chronology of examples of said activities that are geographically located in the area comprised from the town of San Juan de Nicaragua up to a point three English miles from Castillo Viejo, municipality of Castillo, Province of Río San Juan. Said chronology is attached to this statement as Annex 1. I have stated the foregoing clearly understanding the legal scope, value and transcendence of this act, the general clauses that guarantee the validity of this instrument, the special clauses contained herein, and the implicit and explicit waivers made hereunder. I have read this instrument and having stated its concurrence, approve, ratify and sign. I attest to all related matters. (S) Molina.

This occurred before me from the front of page number forty-four to the back of page number forty-four of my Protocol number twenty-one kept during this year. I issue this first certified copy of the Statement on one stamped legal sheet, which I sign, seal and rubricate in the city of Managua, at eight thirty in the morning on the thirty-first of May of two thousand and eight.

Annex 1

CHRONOLOGY OF ACTIVITIES ON THE SAN JUAN RIVER

February 28, 2008

CAPTURE OF CRIMINALS

- 01 January 96: An assault was carried out at the hotel Laguna Lagarto Lodge in Santa Rita, Costa Rican territory located seven kilometers from the border post at Boca de San Carlos, where a group of German tourists were staying. One Swiss woman and one German woman were kidnapped. Between eight and ten individuals in fatigues and ski masks participated in the assault, carrying AK-47s, M-16s and hand grenades.
- 26 April 96, at 09:25 hours: at the San Juan de Nicaragua border post, NA troops captured the criminal Julio Cesar Vega Rojas (33), of Nicaraguan nationality, and seized 37,600 US dollars, 159,000 Costa Rican colones, and 24 Nicaraguan córdobas. It is possible that Vega Rojas is leader of the "Viviana Gallardo Command."
- 01 February 97, at 8:30 hours: in the coastal sector of Punta Castilla (0908), 5km east of San Juan de Nicaragua, a motor-less, 61-foot copper-colored fiberglass skiff was found abandoned on the coast, with the name LORAINE on its side and possible license number PR5416, and a Puerto Rican commercial fishing stamp AÑAZO (002). Inside, 12 kilos of cocaine were

found. It has currently been seized and is held by NA troops and will be transferred to the border post at San Juan de Nicaragua.

- 12 August 97, at 14:00 hours: NA troops in San Juan de Nicaragua captured, in San Juan de Nicragua coordinate (1002), on the river, the vessel named Candy Priscila with three crew members, owned by Francisco Pérez Torres from Barra Colorado, Costa Rica. This man was accompanied by Alexander Sánchez Sánchez and Tomás Vidaurre Cajina from Barra Colorado. A 9.9-HP Suzuki motor was also seized.

- 08 November 97: in the early morning, six foreign individuals (four of Turkish nationality and two Colombians) were smuggling 100 rifles through a blind spot on the border, the Medio Queso sector (2455), 13km southeast of San Carlos.

- 15 July 98, at 09:00 hours: NA troops on the San Juan River at San Juan de Nicaragua captured a skiff named Puma, with three Costa Rican crew members from Puerto Viejo, Costa Rica: Antonio Campos Gaitán (26 years old), Giovany Rugama Reyes (23 years old) and Grayvin Rugama Castro (22 years old). In addition, 784 US dollars and 1,467,805 Costa Rica colones were seized.

- 06 September 98, at 17:00 hours: NA troops from the San Juan de Nicaragua border post, in coordinate (1002), captured a rumbo-type skiff named JENDI MEZA, with a 75-HP Yamaha motor and Costa Rican license CP1786, owned by Costa Rican Santiago Peña Campos, with four crew members on board. Stating they were purchasing drugs, the crew members were: Aletin Rodríguez Barrantes (22 years old), Costa Rican ID card N3-340-991, from whom US$ 2,000 and a Makarov pistol with the serial number erased were confiscated; Richard Taylor Wilson (40 years old), from whom US$ 20 were confiscated; Ronald Briones Castillo, ID card N-260-148661-083249; and Esloy Samud Harris Wallace from Limón, Costa Rica, ID card N-7-080-341.

- 02 July 99, at 15:00 hours: arriving at the mouth of the San Juanillo River, a vessel coming from San Juan del Norte was intercepted by three armed and hooded individuals carrying two pistols and one rifle. These individuals intimidated the vessel owner, Sebastián Urbina Ruiz (Chevo), taking the following items:
  - One gold chain valued at 30,000 colones;
  - One gold ring valued at 20 colones;
  - One 25-caliber pistol;
  - Two million colones.
- After the assault, the criminals withdrew toward El Delta, identifying themselves to Costa Rican citizens Michel and José Reinaldo Cajina Vidaurre.

- 08 August 99: a skiff with two Costa Ricans with records of drug-trafficking activity arrived in San Juan del Norte. The two men were held for not carrying documentation:
  - Virgilio Hernández
  - Roger Félix García
- A fiberglass skiff with a 175-HP motor were seized from them.
- 30 December 2000: Mercedes Jarquín and Dennis Carl Johnson, both of Costa Rican nationality, were captured in the town of San Juan del Norte. Four packets of cocaine were seized and handed over to the National Police in San Carlos.

SQUATTER INVASIONS

- 22 January 96, at 11:00 hours: 5 families have settled in the sector of Dos Bocas de Bartola (1698), 13 kilometers southeast of El Castillo.
- 21 August 96, at 06:00 hours: 72 Nicaraguan citizens living in Costa Rican territory on the edge of the San Juan River occupied part of the Indio Maíz Reserve in the sectors of Caño San Francisco (9225) and Caño El Tambor (9231), 5km and 6km northeast of the Sarapiquí border post. They are demanding the provision of properties.
- 16 August 99: Our troops detected a settlement of 18 people from Costa Rican territory, led by Mercedes Jarquín, in the area of Chingo Petaca (8988), 8km northeast of El Delta.
- 12 October 99: four families from Costa Rican territory settled in sectors of Caño Machado (9412), 5km east of the Boca de San Carlos border post, led by Juan Pastor García, from whom two 0.22-caliber rifles were seized. The families were notified that they cannot settle in this area and that, otherwise, they would be evicted.
- 15 September 2000: 19 squatters from Costa Rica settled in the area of Caño Machado (9412), 5km east of the Boca de San Carlos border post, and on 16 September 2000 were evicted by a Nicaraguan Army patrol and transferred to Costa Rican territory.
- 02 February 2000: Costa Rican citizen Francisco Marazán Flores was evicted from the sector of Remolino Grande (9221), 14 kilometers east of Boca de San Carlos. He was handed over to Costa Rican authorities at Boca de San Carlos.
- 03 February 2000: three families from Costa Rica who had settled in the area were evicted from the sector of Las Cureñas (9173), 7km northeast of the Sarapiquí border post.

- 07 June 2000: Costa Rican farmer José Antonio Ortega González was found preparing an area for settlement in the San Francisco (9074) sector, 5km northeast of the Sarapiquí border post, and was evicted.

SEIZURE OF LUMBER

- 20 January 96, at 11:00 hours: NA troops seized 192 planks that had been cut by Costa Rican individuals in the sector of Camibar (2931), 25km southeast of San Carlos, on the property of Manuel Salguera García.
- 25 June 96, at 15:00 hours: the cultivation of 0.17 hectares was detected on the banks of the San Juan River in Las Cruces (8775), 5km northeast of the Sarapiquí border post. This activity was carried out by Costa Rican and Nicaraguan citizens that live in Costa Rican territory on the banks of the San Juan River.
- 26 May 97: five thousand board feet of lumber had been cut by Salomón Vásquez in the sector of Camibar (2931), 25km southeast of San Carlos, and transferred to Costa Rican territory via the Camibar River.
- 29 May 97, at 13:30 hours: a Stolly chainsaw was seized from Danilo Meza in the sector of Punta Jobo, four kilometers west of El Delta border post, for the felling of two trees and the transfer of their lumber to Costa Rica for sale.
- 10 June 97: in the sector of Nazareth (2829), 26km southeast of San Carlos, Víctor Herrera, who had been authorized by MARENA to cut 12 timber trees, instead cut 40 trees, transferring the lumber to Costa Rican territory through the sector of San Antonio. The lumber was the property of Olga Velásquez and Eva Velásquez, Nicaraguan citizens living in Upala, Costa Rica.
- 21 June 97: in the sector of marker stones 8 and 9, La Ñoca, 22km and 23km southeast of San Carlos, it was detected that 2.8 hectares of forest had been felled by unknown citizens of Nicaraguan nationality living in Costa Rican territory.
- 08 February 01: Costa Rican subjects cut two cedar trees in sectors of Isla La Culebra, 5km southeast of El Delta border post.
- 12 February 01: the felling of three cedar trees by Costa Ricans was discovered in sectors of Isla La Chimurria (8992), 5km southeast of the El Delta border post.
- 26 November 01: a Nicaraguan Army river patrol discovered the felling of four cedar trees by individuals from Costa Rica in sectors of Isla California (9326), 9km northeast of the Sarapiquí border post.

- 04 December 01: the felling of four cedar trees by individuals from Costa Rica was discovered in sectors of Caño San Francisco (9426), 10km northeast of the Sarapiquí border post.
- 10 February 02: a PEA discovered the felling of one cedar tree and 40 4x8x2 planks of cedar in sectors of Chingo Petaca (8888), 8km northeast of the Sarapiquí border post.

ILLEGAL HUNTING AND FISHING

- 31 January 96, at 15:00 hours: NA troops in the sector of Caño Las Cureñas (9173) 7km northeast of the Sarapiquí border post, on the San Juan River captured and seized a 0.22-caliber rifle from Costa Rican subject Ramón Mairena Pastora, who was hunting endangered species.
- 22 August 96, at 06:30 hours: in the sector of Punta de Castilla (1064), 6km east of San Juan de Nicaragua, NA troops captured two vessels coming from Costa Rican territory with seven crew members, including three Costa Ricans: José Giovany Peña Vega, Nortiel Sánchez Tuckler, Luis Ángel Peña Vega, and four Nicaraguans, identified as Juan Alvarado Menay, Carlos González Hodgson and Eugenio Sánchez Tuckler.
- 19 December 96, at 14:00 hours: two citizens of Costa Rica, Juan Jarquín Acevedo and Lázaro Jarquín Acevedo, both without ID cards, were found and captured in the sector of Isla Tabora (9506), 1.5km west of the Boca de San Carlos border post. They carried a 0.22-caliber rifle, serial number 2027892-2996656, and intended to hunt illegally in the sector of the Indio Maíz Biological Reserve.
- 06 March 97: the Sarapiquí border post reported that Costa Rican national Dr. López entered Nicaraguan waters in a tourism boat, presenting a letter signed by the embassy to enter the territory, and was found bass fishing in front of the Caño San Juanillo (0506), 5km southeast of San Juan de Nicaragua, and, from there, entering the channels of the Indio Maíz Reserve for illegal tourism in smaller vessels (skiffs).
- 15 April 97, at 06:00 hours: NA operational services at El Delta border post destroyed 33 fishing traps used by Costa Rican citizens to capture shrimp in Caño La Culebra (9302), 4km northeast of El Delta.
- 19 June 97, at 19:00 hours: NA troops found a trammel net used for fishing by Costa Rican citizens in the sector of Bocana la Tigra (8686), 5km east of Sarapiquí.

- 04 August 97, at 10:00 hours: the NA disabled nine fishing traps in the sector if Las Casas (0308), 10km southeast of San Juan de Nicaragua, finding three kilos of shrimp. The traps were placed by Costa Rican hunters and fishers.
- 23 August 97, at 13:00 hours: NA troops captured Costa Rican subject Manuel Tenorio Escamilla (33), with ID card number 2357065, in the sector of Valencia (0806), 6km southeast of San Juan de Nicaragua, on the banks of the San Juan River.
- 12 October 97, at 12:30 hours: NA troops and MARENA personnel captured three Costa Rican citizens hunting and fishing illegally in the sector of Las Tiricias (1091), 10km southeast of El Castillo.
- 13 November 97, at 15:00 hours: NA troops captured three Costa Rican individuals who were fishing illegally in the sector of Valencia (0806), 6km southeast of San Juan de Nicaragua, seizing two 0.22-caliber rifles, one 16-caliber shotgun. The names of those captured are Roger Mejía Ocampo (27), with ID card number 2450557; José Meneses Montiel and Noel Torres Gutiérrez (36).
- 25 November 97, at 05:00 hours: vessels of Costa Rican nationality from Barra Colorado, Costa Rica, were carrying out illegal fishing in the sector of El Delta, 15km south of San Juan de Nicaragua, on the San Juan River.
- 13 March 98, at 14:20 hours: in the sector of Remolino Grande (9121), 13km east of the Boca de San Carlos border post, NA troops captured two Costa Rican vessels that were navigating the San Juan River without authorization. On board were seven occupants (six Costa Ricans and one Nicaraguan) who were hunting and fishing illegally: Ubaldo Hidalgo Méndez of Ciudad Quezada, Arquimedes Hidalgo Méndez of Ciudad Quezada, Gilberto Castro Ocampo of Ciudad Quezada, José Luis Chavarría of Ciudad Quezada, Brandon Vargas of Ciudad Quezada and Félix Flores Miranda, a Nicaraguan from Boca de San Carlos. The following items were seized: four 0.22-caliber pistols, one harpoon, two skiffs with their motors, and two additional motors.
- 09 May 98, at 10:00 hours: NA troops destroyed 14 fishing traps in the Sarapiquí sector (8775), 4km northeast of the border post, on the San Juan River.
- 20 September 99: in the sector of El Sarnoso River, 14 kilometers northwest of Boca de San Carlos, the following four Costa Rican civilians were captured carrying out illegal hunting and fishing:
    - Alejandro Salvador Mena
    - Jimmy Salvador Guevara
    - Gilberto Dávila Guevara
    - Marvin Reyes Cruz

They were handed over to the Costa Rican Civil Guard.

- 09 January 2000: three Costa Rican subjects aboard a canoe entered the Indio Maíz Biological Reserve, in the sector of Caño Chorrera, in order to hunt illegally.
- 16 September 2000: a combined Army / MARENA patrol detained and captured two small vessels in the sector of El Portillo, three kilometers east of San Juan de Nicaragua, for illegal fishing. Three Costa Ricans and two citizens of the United States were detained and handed over to Immigration authorities in San Juan de Nicaragua.
- 09 February 01: a river patrol from the Sarapiquí border post destroyed 28 shrimp traps in the sector of Isla Morgan.
- 12 February 01: a river patrol from the Sarapiquí border post destroyed 85 shrimp traps in the sector of Isla La Culebra (8992), 4km southeast of the El Delta border post.
- 02 April 01: three Costa Rican nationals on board a skiff entered sectors of Caño Machuca (0400), 10km northeast of the Boca de San Carlos border post, and were captured when hunting illegally. The skiff and a 0.22-caliber rifle were seized. The subjects were handed over to Immigration.
- 09 August 01: a canoe with fishing lines was found in the sector of Caño Machado (9412), 5km east of the Boca de San Carlos border post. It was seized after being abandoned by those who were using it for illegal fishing.
- 02 December 01: a river patrol from the Sarapiquí border post destroyed 21 fishing traps in sectors of Chingo Petaca (8988), 8km northeast of the Sarapiquí border post.
- 24 January 02: Costa Rican David Espinoza was captured in a sector of Caño Machado (9412), 5km east of the Boca de San Carlos border post, when fishing illegally. His canoe and fishing lines were seized.
- 20 March 02: three subjects of Costa Rican nationality were captured by the Nicaraguan Army in sectors of Isla California (9327), 7km northeast of the Sarapiquí border post, when they were hunting illegally:
  - Leonel Machado Jirón
  - Isabel González Arias
  - Eusebio Arias Jirón
- 14 April 02: A skiff with five Costa Ricans aboard was captured in a sector of Caño Las Cruces (0308), 8km northeast of the Boca San Carlos border post, when found fishing illegally. The skiff was seized. The following detainees were handed over to Immigration authorities:
  - Alberto Arieta Vargas

- **Oliver Pérez Gamboa**
- **Jose Benigno Prado**
- **Cecilio Amador Rivera**
- **Felix Alpizar Campos**

Annex 75

AFFIDAVIT OF EDÉN ATANASIO PASTORA, 10 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER EIGHTEEN - NOTARIAL CERTIFICATE. In the city of Managua, at one in the afternoon on tenth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **EDEN ATANASIO PASTORA**, stands before me and in his own name, with identity card number 449-220137-000M, of age, married, fisherman and domiciled in the city of Managua, Municipality of Managua, Nicaragua. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of the Republic of Nicaragua. I was born in the city of Darío, Matagalpa Province, on the twenty-second of January, 1937. I am very familiar with the San Juan River and the Colorado River, and the activities that took place on both rivers in the years between the mid 1960s and the late 1980s, based on my personal experience in this region.

Second: I became a member of the *Frente Sandinista de Liberación Nacional (FSLN)*, a revolutionary movement dedicated to overthrowing the Somoza dictatorship in Nicaragua, in 1964. I operated then, and for the remainder of the 1960s and most of the 1970s, principally between San Juan del Norte in Nicaragua and Barra del Colorado in Costa Rica. The former is at the mouth of the San Juan River. The latter is at the mouth of the Colorado River. I frequently navigated by river between the two towns. The route takes you from San Juan del Norte west along the San Juan River until the point known as Delta, where the San Juan divides and part of it forms the Colorado River that flows through the Costa Rican coast. At Delta you turn to the left and enter the Colorado River and follow it to its mouth, where Barra del Colorado is located.

Third: Between 1972 and 1977, I was engaged in the shark fishing business in the Colorado River, which also served as a cover for my clandestine activities on behalf of the FSLN during that period. In the final stage of the revolution against the Somoza dictatorship, between 1977 and 1979, I was a guerrilla commander, leading the group of revolutionary forces known as the *Frente Sur*, which staged attacks against the armed forces of the dictatorship from bases in Northern Costa Rica, just south of the San Juan River. In the final uprising, between January and July 1979, a major offensive was launched by the forces of the *Frente Sur* across the San Juan River and into Central Nicaragua. After the triumph of the revolutionary forces and the establishment of a new

Government of National Reconstruction on 19 July 1979, I served in the new government as Vice Minister of Defense.

Fourth: However, I soon became disillusioned with the direction of the new government because, in my view, it was beginning to betray the democratic aspirations of the Nicaraguan people, which is what I always thought I along with my fellow compatriots in the FSLN had been fighting for since the mid 1960s. Eventually, I resigned my post and went back to Costa Rica to organize and lead another revolutionary struggle, this time against the government in Nicaragua that had replaced the Somoza dictatorship, but to me seemed more and more like a dictatorship of a different kind. By 1982, I became the Commander of the *Alianza Revolucionaria Democrática* (ARDE), a guerrilla force of approximately 7,500 combatants, based in southern Nicaragua, just north of the San Juan River. Between 1982 and 1986, ARDE battled the forces of the Nicaraguan government all along and across the San Juan River. Other guerrilla forces opposed to the Government of Nicaragua also operated in this area, and continued to fight for the remainder of the decade of the 1980s and even into 1990 and 1991.

Fifth: Based on my personal experience in the region between the mid-1960s and the late 1980s, especially my military and paramilitary experience, I am very familiar with what kind of vessels navigated along the San Juan River and the Colorado River, and the frequency and purpose of those trips. During the 1960s and 1970s the San Juan River was controlled by the Nicaraguan Army, which was then known as the *Guardia Nacional*. The *Guardia Nacional* exercised a tight control over the San Juan River, and did not permit navigation by Costa Rica's *Guardia Civil*. During this period, relations between the governments of Nicaragua and Costa Rica were poor. General Somoza and his military clique always suspected that the Government of Costa Rica was its enemy, and that it supported the revolutionary groups that wanted to overthrow his regime. In fact, while the level of support or tolerance of the Costa Rican government for the Nicaraguan revolutionaries who operated from its soil varied over time, General Somoza was fundamentally correct in his assessment of Costa Rica's behavior. For this reason, among others, the *Guardia Nacional* did not permit Costa Rican security forces to navigate on the San Juan River. This did not prevent Costa Rica from bringing supplies or relief to its posts close to the right bank of the San Juan River, which during that period were located only at Boca San Carlos and Boca de Sarapiquí. Costa Rica supplied the post at Boca San Carlos by sending goods by boat down the San Carlos River to its junction with the San Juan River. Likewise, Costa Rica supplied the post at Boca de Sarapiquí by boat, which was around three hours from Puerto Viejo de Sarapiquí. Costa Rica also had a post at Barra del Colorado, which was supplied by air, since there was an airport at that location.

Sixth: During this period, there was very little commercial traffic along the San Juan River. There was almost no trade between San Juan del Norte, which was the only Nicaraguan town along the entire length of the river, with the Costa Rican side. In that period, San Juan del Norte received its provisions either from Bluefields, up the Atlantic Coast of Nicaragua, or from San Carlos, on Lake Nicaragua at the source of the San Juan River. Later, during the time that I commanded ARDE's forces against the Nicaraguan government in the 1980s, San Juan del Norte became completely isolated and the entire population left. In the 1960s and 1970s there was some trade in goods between Puerto Viejo de Sarapiquí and Barra del Colorado, which necessarily included transport along a portion of the San Juan River, but this was small and infrequent, and consisted only of some basic foods and other supplies. There were no customs posts anywhere along the river, and no international trade at all. Nor was there any significant tourism during this period. Of course, some explorers or nature lovers set out from Barra del Colorado from time to time, and went up the Colorado River to the San Juan River, but this was neither regular, organized or frequent. In any event, it all came to a stop during the final offensive against the Somoza dictatorship in the late 1970s, and during ARDE's struggle against the Sandinista government in the 1980s. The principal and most frequent use of the river by Costa Ricans during this entire period, from the 1960s to the 1980s, was by the local population that lived in the small settlements in Costa Rica's territory. They navigated the river in their small boats as part of their daily lives. But even this was reduced to a minimum during the height of the war years, 1977 to 1979 and 1982 to 1986, because of the extreme risk of going out on a river that was the center of a war zone, where every boat was a potential target of either the ARDE forces or the Sandinistas if it was suspected of belonging to or assisting the other side.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to present the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the front of folio number twenty-three to the reverse of folio number twenty-four, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, in two pages of legally sealed paper, which was signed, sealed, and dated, on the city of Managua, at three thirty in the afternoon of the tenth of March, 2008.

Annex 76

AFFIDAVIT OF FRANKLIN PONCE ORTIZ,
7 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER TEN - NOTARIAL CERTIFICATE. In the city of San Carlos, San Juan River Province, at ten in the morning on the seventh of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **FRANKLIN PONCE ORTIZ,** stands before me and in his own name, with identity card number 521-121075-0001V, of age, single, office worker, and domiciled in the city of San Carlos, San Juan River Province. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of the Republic of Nicaragua, born in the city of San Carlos, of this same province, the twelfth of October, 1975. I am currently the Immigration Dispatch's Inspector for the Department of Immigration, Dirección General de Migración y Extranjería, for the entire San Juan River Province. I have held this position since June 2002.

Second: When I first began to serve as an immigration agent in the San Juan River area, only two immigration posts had been established, one was located on the Sarapiquí River and the other at San Juan de Nicaragua. The immigration posts located at Boca de San Carlos and Delta were established during the time I was working in the San Juan River region. The post at San Juan de Nicaragua was the first to be established, in 1994, due to the influx of Nicaraguan refugees living abroad invited by the UN High Commissioner for Refugees to repopulate the town, which had been abandoned during the war in the 1980s; as such, the immigration post in San Juan del Norte originally functioned to help process this new population of residents. Since then, the immigration posts located along the river have taken on their proper functions of regulating the flow of foreign citizens who enter into Nicaraguan territory through the San Juan River.

Third: As an immigration agent, my work applies to foreigners entering Nicaraguan territory, in this case via the River San Juan. The foreigners entering the country through the river primarily do so using tour boats, and a few are Costa Rican boatmen who use the river to transport goods for local consumption. In addition, one Costa Rican boatman transports local passengers from the community called La Tigra to Puerto Viejo, both in Costa Rican territory. As has been similarly required in Costa Rica for Nicaraguans for some thirty years, Nicaragua requires Costa Rican citizens to acquire a consular visa to enter Nicaraguan territory, unless they are residents of the San Juan River banks. Thus, under the national laws and regulations, the couple of non-local Costa Rican boatmen who need to navigate the river must have a visa. However, the municipality of San Juan de Nicaragua made a request that the Department of Immigration create an exception for Costa Rican citizens who were transporting goods to the town via the river, which was granted. Under this exception these few Costa Rican boatmen are not required to acquire a visa or a tourist card.

Fourth: In addition, the immigration authorities on the river do not regulate the local residents. River residents, for their own safety and for the security of the territory, are simply required to register themselves with the military officials when they pass a military post. As immigration authorities, we have no interaction with them, as they are not considered foreign travelers.

Fifth: Thus the primary work conducted by immigration officials on the San Juan River posts of San Juan de Nicaragua, Delta, Boca de Sarapiquí, and Boca San Carlos is processing foreign travelers arriving by tourist boats on the river. This process is the same process required at any international immigration point for the entry into and exit from Nicaraguan territory. Those entering Nicaraguan territory through any point must acquire a tourist card, which currently costs US $5, and a US $2 charge for immigration services. At all Nicaraguan immigration exit points, the foreign tourists must also present themselves upon leaving the country, and pay US $2 for immigration services.

Sixth: Most foreign travelers entering Nicaragua are not required to have a consular visa, as they are on an immigration list as Category "A," which signifies that they are "visa free" (*libre visado*). Currently, this category consists of at least 77 countries, including those from which the great majority of the foreigners entering the San Juan River originate, including the United States, the European Union countries, Australia, and Mexico. The relatively few foreigners of other nationalities entering Nicaraguan by the river are required to present their passports with visas. The requirement that non-local Costa Ricans have a consular visa to enter Nicaragua is based on reciprocity. All Costa Rican immigration entry posts require a consular visa from Nicaraguan travelers entering Costa Rica.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) illegible (f) Molina.

This occurred before me from the reverse of folio number nine to the reverse of folio number ten, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on two pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at nine in the morning of the tenth of March, 2008.

Annex 77

AFFIDAVIT OF COLONEL RICARDO SÁNCHEZ MÉNDEZ, 9 MARCH 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER SIXTEEN - NOTARIAL CERTIFICATE. In the city of Managua, at five in the evening on the ninth of March, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2008. Mister **RICARDO SANCHEZ MENDEZ,** stands before me and in his own name, with identity card number 001-240256-0035R, of age, married, in military service, and domiciled in the city of Matagalpa, Municipality of Matagalpa, in transit in this city. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

First: I am a citizen of Nicaragua, born in the city of Managua, on the 24th of February, 1956. I am a Colonel in the Army of Nicaragua. I have had this rank since 2003. My present assignment is as Chief of the Sixth Regional Military Command. I have had this position since the 6th of July, 2007.

Second: Between the 3rd of December 2002 and 5th of July, 2007, I served as the Chief of the South Military Detachment, with headquarters in San Carlos and responsibility for security, border protection, and environmental protection in the San Juan River Province, and for safety of navigation on the San Juan River and the southern part of Lake Nicaragua, which are part of that Province.

Third: During the period that I served as Chief of the South Military Detachment, I maintained good relations with my Costa Rican counterparts, whose last names were Esquivel and Cubero, and who were responsible for security along Costa Rica's border with Nicaragua. We met periodically, either at my headquarters in San Carlos or at their posts on the Costa Rican side to exchange information relating to border security, criminal activity and other subjects of mutual concern. From time to time, I authorized the troops under my command to assist Costa Rican institutions in carrying out humanitarian activities directed toward the local Costa Rican population.

Fourth: During this period of more than four and a half years, neither the *Guardia Civil* nor any other Costa Rican security or law enforcement personnel navigated on the San Juan River. Nor did they ever request permission from me or any other Nicaraguan authority to navigate on the river. This was not part of their mission. They were responsible for security in Costa Rican territory only, including the right bank of the San Juan River, east of the point that is three miles below El Castillo, continuing to the east until the Atlantic Ocean, and on Costa Rica's inland waterways, such as the San Carlos, Sarapiquí and Colorado Rivers. Security on the San Juan River itself was the exclusive responsibility of Nicaragua, which has sovereignty over the river. During these four and a half years the Costa Ricans did not use the San Juan River to supply or replace their security forces stationed at their police posts south of the right bank of the river, at Boca San Carlos, Boca de Sarapiquí and Delta. Nor did they ever ask permission to do so. Instead, they regularly supplied and replaced these forces by land, using the roads that Costa Rica had constructed and improved during the 1990's and continued improving and extending during the early 2000's. By the time I was placed in charge of the South Military Detachment, all of these posts were connected by roads. I am aware that, at some times prior to my service as Commander of the South Military Detachment, the *Guardia Civil* navigated the San Juan River not for security or other police purposes, but for the sole purpose of bringing supplies and replacements to its security personnel stationed along the river. That practice, which ceased in mid-1998, was always contingent upon the Costa Rican authorities' making a prior request for permission from Nicaragua to navigate the river to supply and replace their security forces, and Nicaragua's issuance of this specific authority to the Costa Ricans. The practice was also contingent upon the Costa Ricans' strict compliance with the requirements established by Nicaragua, especially, that the vessels carrying Costa Rican security officers report to the nearest Nicaraguan military post upon entering the San Juan, that the Costa Rican personnel remain unarmed while navigating the river, that their arms be placed and kept on the floor of their vessel, and that a Nicaraguan soldier accompany them aboard the vessel during the entire time they remained in Nicaraguan waters. I am aware that the Costa Ricans fully complied with these requirements, at least until the middle of 1998, when the practice ceased.

Fifth: Occasionally, during my period as Chief of the South Military Detachment, Costa Rican government officials other than security personnel requested permission to navigate the San Juan River. In all such cases, the requests were directed at the Ministry of Foreign Relations in Managua, which made the decision whether to authorize the requested navigation or not. Whenever an authorization was given, the Costa Rican vessel was required to report to a Nicaraguan military post upon entering and leaving the San Juan, to undergo a safety inspection at the point of entry and receive a departure clearance certificate (for which Costa Rican official vessels, as a courtesy extended by Nicaragua, were not charged a fee), and to report the names of all those on board. Upon leaving Nicaraguan waters, the vessel had to present of list of passengers to the army post, for the purpose of verifying that all who entered were departing. No fees were charged for the boat or for the passengers.

Sixth: Local Costa Rican residents who lived in the Costa Rican territory to the south of the right bank of the San Juan River, and boatmen who transported basic goods between hamlets located in the area, navigated the river without restrictions, except for the prohibition on river navigation at night. This was both a safety requirement, since navigation after dark is extremely dangerous and unwise, and a security and environmental protection necessity, because most criminal activity and environmental depredation (including hunting and fishing for protected species in the Indio Maíz Biological Reserve and the San Juan River) took place at night. During daylight hours, local residents navigated freely. For security and safety reasons they were required to report their comings and goings on the river (as were Nicaraguans who used the river). They were given departure clearance certificates as a matter of courtesy and without charge. There were very few boatmen who carried goods along the river, because there was very little trade in goods between settlements. I recall, in particular, the transport of coconuts to Barra del Colorado, commerce in basic groceries and household goods purchased in Puerto Viejo de Sarapiquí and carried to hamlets along the San Juan, and the transport of some seafood from San Juan del Norte to Barra del Colorado using the San Juan River and then the Colorado River. On average those people made two voyages a month to carry out this very limited trade, and always in small boats. There were no customs posts at any of these locations, and any goods that went from Nicaragua (San Juan del Norte) to Costa Rica or vice versa entered without passing through customs. Local boatmen, both Nicaraguan and Costa Rica, were required to have a safety inspection and obtain a departure clearance certificate from Nicaragua on entering the San Juan River. We encountered no difficulties with the local boatmen, nor they with us during the period that I was Chief of the South Military Detachment.

Seventh: By far, the most frequent use of the river for navigational purposes (apart from the regular patrols conducted by Nicaraguan army personnel in their official vessels), was by Costa Rican tour operators, who carried tourists between Puerto Viejo de Sarapiquí and Barra del Colorado or Tortuguero on the Atlantic Coast. They navigated only a small section of the San Juan River, between Boca de Sarapiquí and Delta. For safety reasons, all tourist boats (including those operated by Nicaragua from El Castillo or San Juan del Norte) had to stop at the army post closest to their point of entry onto the river and submit to a safety inspection, which included a determination that the vessel was not carrying any weapons, explosives or other flammable materials. Upon passing the inspection, the boatman was issued a departure clearance certificate for a fee of US$ 5, or the equivalent in cordobas or colones. Tourists, as at all Nicaraguan points of entry, were required to obtain a Nicaraguan tourist card for a fee of US$ 5. They were also registered as entering and exiting Nicaragua by immigration officers. A fee of US$ 2 was charged both for entry and exit. This is also required in any immigration point in Nicaragua. Tourists were also required to show valid passports. Very rarely were they ever required to show a Nicaraguan visa, because Nicaragua does not require tourists from North America, member countries to the European Union, Canada or Australia to obtain visas, and almost all of the tourists on these vessels were from those countries, with very few exceptions. In 2005, Nicaragua began to require that citizens of Costa Rica obtain visas to enter Nicaragua, not only upon entering the San Juan River, but at all Nicaraguan points of entry. This was in response to Costa Rica's practice of requiring Nicaraguans to obtain a Costa Rican visa, imposing very strict requirements. It is much easier for Costa Ricans to obtain a Nicaraguan visa. After Nicaragua imposed this reciprocal visa requirement for Costa Ricans, Costa Rican boatmen and other crew members, if any, were required to present passports with valid Nicaraguan visas stamped in them.

Eighth: Also in 2005, Nicaragua began to enforce more strictly a requirement on river navigation that had long existed, but had been loosely enforced. This was a requirement that vessels navigating the San Juan River, which is under Nicaraguan sovereignty, fly a Nicaraguan flag. The requirement was not applicable to all vessels. Small boats like the kind used by local residents were not required to fly a Nicaraguan flag. The requirement was applicable only to large motorized boats that had prows at the fore and aft ends. These vessels were permitted to fly the Costa Rican flag. But in Nicaraguan waters, both as a matter of courtesy to the host State and respect for its sovereignty, they were required to fly the Nicaraguan flag as well. In practice, this meant only that the Costa Rican tour boats kept a Nicaraguan flag on board, and hoisted it during the time they were on the San Juan.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to liberate the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) Illegible (f) Molina.

This occurred before me from the front of folio number eighteen to the front of folio number twenty, from my present Protocol number twenty-one that I have in the present year. This first testimony, from which the Declaration is made, was carried out, on three pages of legally sealed paper, which was signed, sealed, and dated, in the city of Managua, at one in the afternoon of the tenth of March, 2008.

Annex 78

AFFIDAVIT OF BRIGADIER GENERAL FRANCISCO ORLANDO TALAVERA SILES, 19 MAY 2008

TESTIMONY OF PUBLIC DOCUMENT NUMBER TWENTY-FOUR - NOTARIAL DECLARATION. In the city of Managua, Province of Mangua, at ten in the morning on nineteenth of May, 2008. Before me, **WALNER ABRAHAM MOLINA PEREZ,** Attorney at Law and Notary Public of the Republic of Nicaragua, domiciled in the city of Managua, duly authorized by the Honorable Supreme Court of Justice to act as notary during the five year period that expires on fifteenth of April, 2013. Mister **FRANCISCO ORLANDO TALAVERA SILES**, stands before me and in his own name, with identity card number 241-051257-0010G, of age, married, in active military service, and domiciled in the city of Managua. Who I swear to know personally and who in my judgment has sufficient civil and legal capacity necessary to bind himself and contract, especially for the execution of the present act. Manifests the following:

FIRST: I am a citizen on the Republic of Nicaragua. I was born in the city of Jinotega, Jinotega Province, on 5 December, 1957. I am a Brigadier General in the Army of Nicaragua. I am currently the Chief of the Office of Civil Affairs of the Nicaraguan Army. I have had this rank and held this position since September 2006 and since 12 March 2003, respectively.

SECOND: From 29 October 1997 until 29 June 2000, I was Chief of the Southern Military Detachment, headquartered in San Carlos, and responsible for security and border protection in the entire Province of Río San Juan, which includes the San Juan River and the Indio Maíz Grand Biological Reserve.

THIRD: Upon assuming my responsibilities as Chief of the Southern Military Detachment, I had a meeting at my headquarters in San Carlos with my Costa Rican counterpart, Colonel Walter Navarro Romero, who as Director General of the Public Force (*Fuerza Pública*), was commander of all of the Costa Rican security personnel in the border region. He explained to me that the *Guardia Civil* had been regularly navigating the San Juan River in their official vessels every month, after having requested and received prior authorization from the Chief of the Southern Military Detachment, for the purpose of delivering supplies and replacing the personnel at the police posts at Boca San Carlos, Boca de Sarapiquí and Delta, and that they would like authorization to continue doing so. Colonel Navarro explained that, although the posts could be supplied by road, it was inconvenient to do so during periods of heavy rain. However, Colonel Navarro further requested that, in contrast to past practice, I authorize the *Guardia Civil* officers to travel armed, "in case of an unexpected eventuality." I told Colonel Navarro that I was willing to support the resupplying of the posts, but that I would not authorize Costa Rican security personnel to navigate the San Juan River with police uniforms and arms. Colonel Navarro accepted my decision, as he had no other choice since the San Juan River is under the sovereignty of Nicaragua, and between November 1997 and May 1998, the *Guardia Civil* navigated the San Juan River in conformity the same procedures as were employed prior to my arrival as Chief of the Military Detachment, which was that the resupplying had to be carried out by civil personnel.

FOURTH: There were no problems with this arrangement until June 1998. During that month, vessels of the Costa Rican *Guardia Civil*, without authorization from my headquarters, began to intercept Nicaraguan vessels carrying Nicaraguan passengers in Nicaraguan waters, based on the suspicion that they were planning to enter Costa Rica illegally. The *Guardia Civil* forced the Nicaraguan vessels to land on Costa Rican territory, where all the passengers were immediately arrested. In one of these incidents, on July 7, 1998, a Nicaraguan boat, carrying the Minister of Tourism, was intercepted by two Costa Rican *Guardia Civil* boats, upon passing the Costa Rican post at La Cureña. The *Guardia Civil* personnel attempted to order the boat to detain its travels in order for the vessel to be searched. The order was, of course, denied. After these incidences first began, I traveled to the Costa Rican command post at Los Chiles, on June 25, 1998, to meet with my counterpart and discuss these violations. However, the meeting was cancelled, since he never arrived. Soon thereafter, I again protested these unauthorized and unlawful violations of Nicaragua's sovereignty to Colonel Navarro, explaining that Nicaragua could not tolerate the *Guardia Civil* entering Nicaraguan waters to arrest Nicaraguan citizens in their own country, especially without having violated any law, and that they were not found to have an illegal status in our territory. I communicated to him that he and his forces were forbidden from detaining Nicaraguans on the San Juan River, and I reminded him that Costa Rican security personnel were prohibited from transporting, carrying, or using arms on the San Juan River. Colonel Navarro responded that if the Army of Nicaragua was not going to stop Nicaraguans from using the river to enter Costa Rica illegally, then the *Guardia Civil* would do it. As a result of that incident, and Colonel Navarro's refusal to discontinue the *Guardia Civil's* forcible detention of Nicaraguans, I ratified my order prohibiting the *Guardia Civil* from navigating on the river. Costa Rica responded by prohibiting any Nicaraguan army or police officer from entering Costa Rican territory, including Costa Rican rivers, and declaring that if any such person were found on Costa Rican soil or waters he would be detained. From that date forward, or, from the middle of July 1998 until the end of June 2000, when my tenure as Chief of the South Military Detachment ended, no *Guardia Civil* vessels navigated the San Juan River. Nor did any Nicaraguan vessel or officer of the army or police enter Costa Rican waters or territory. During this two year period, Costa Rica sent supplies and personnel to its police posts along the San Juan River by road.

FIFTH: In July 2000, less than a month after I left the Southern Military Detachment, a high level meeting of Nicaraguan and Costa Rican security officials was organized to discuss this situation at San Juan del Sur, on Nicaragua's Pacific Coast. The Nicaraguan delegation was led by General Javier Carrión McDonough, Commander in Chief of the Army of Nicaragua, and included Colonel Ricardo Wheelock Román, Chief of the Center for Military History; Major Walner Molina Pérez, Deputy Chief Legal Counsel; and Dr. Cecile Saborío Coze, Secretary General of the Ministry of Foreign Relations. The Costa Rican delegation was led by Minister of Public Security Rogelio Ramos Martínez, and included Colonel Walter Navarro Romero, Director General of the Public Force; and Colonel Carlos Alvarado Valverde, International Legal Advisor to the Ministry of Public Security and the Ministry of Foreign Relations. I was not present at that meeting, but I understand that the Costa Rican representatives again sought permission from Nicaragua to navigate the San Juan River for the sole and explicit purpose of supplying their border posts kept to the south of the right bank of the San Juan River, these posts being those at Boca San Carlos, Boca de Sarapiquí and Delta, but that the meeting did not result in any changes to the situation on the San Juan River, and that, following the meeting the prohibition on navigation by the *Guardia Civil* was maintained by Nicaragua and respected by Costa Rica.

SIXTH: The prohibition on official Costa Rican navigation of the San Juan River did not extend to private Costa Rican navigation, which continued freely during my tenure as Chief. The most frequent use of the river was by Costa Rica tourist boat operators. They navigated only on short stretches of the river. Principally, they navigated on the San Juan River only between Boca de Sarapiquí and Delta, a distance of 24 km, on the route between Puerto Viejo de Sarapiquí and Barra del Colorado; or, less frequently, in the area between Boca San Carlos and El Castillo (the latter lying on the part of the river where both banks belong to Nicaragua). In all cases, for the personal safety and territorial security reasons, the tourist boats were required to register at Nicaraguan border posts, both when they entered and left Nicaragua. Upon entering, the vessel was inspected to determine its safety, and the boat operator's license was reviewed to assure its validity. The boat operator was required to pay US$ 5 for this service and was issued a departure clearance certificate which permitted the vessel to navigate on the river; Costa Rica also required vessels navigating in its waters to obtain a departure clearance certificate as a condition of being authorized to navigate. Tourists, but not crew members, were required to purchase a Nicaraguan tourist card for US$ 5, and to pay $4 for immigration services covering their entry and exit of national territory. Tourists were required to have valid passports, and depending on their country of origin, a valid visa. These are the same requirements applicable to tourists who enter the country through any international immigration post.

SEVENTH: There is a very insignificant amount of river traffic dedicated to transport of goods between communities near the river. Except for San Juan del Norte with a population of some 200 people, there are no communities on the left side of the river, because the entire area is part of the Indio Maíz Grand Reserve and the San Juan River Wildlife Refuge, where human habitation is prohibited, and entry into the area is closely controlled and monitored. I recall that there was some small amount of trade between San Juan del Norte and Barra del Colorado, mainly in the transport and sale of shellfish. There was also a small amount of local trade between Puerto Viejo de Sarapiquí and a few of the communities on Costa Rican territory. This trade, or what there was of it, proceeded without interference. Boatmen were required to undergo safety inspections and to obtain departure clearance certificates, and sometimes their cargo was inspected to assure that they were not carrying protected plant or animal species illegally extracted from the reserves. There was a serious problem during this period in the illegal cutting of trees and stealing of logs from the reserves by Costa Rican residents, as well as the hunting or capturing of animals from the reserve. It was also illegal to fish in the river, since all the aquatic life was considered in danger and subject to protection. This was an essential means of preventing, discouraging, or at least keeping to a minimum, the depredation of flora and fauna from the Reserves.

EIGHTH: The river was also navigated freely by local Costa Rican residents. Because the local population was very small, all of the residents and their boats were or soon became familiar to the Nicaraguan soldiers manning the posts along the San Juan River. Local residents were given courtesy departure clearance certificates, for which they were not charged, and they were exempt from Nicaragua's immigration requirements. They were required only to inform the nearest Nicaraguan post of their entry to and departure from the river, for safety and security purposes. They were not required to request authorization to use the river, nor were they ever stopped from using it. The only limitation on this use was a prohibition – applicable to all vessels, including Nicaraguan vessels – from navigation at night. This was an important safety requirement, since it was very dangerous to navigate the river in the dark. Even Nicaraguan military vessels did not navigate at night, due to the presence of many fallen trees and other objects that were not visible in the dark, the numerous sand bars (also invisible at night) where the river is low and it was difficult to transit, the presence of crocodiles and the fact that local boats were not outfitted with lights, creating a hazard for themselves and for any other boats they might encounter.

As expressed by the person appearing before me, and well instructed by me, the notary, about the purpose, value and legal transcendence of this act, of the general clauses that assure its validity, of the specifications involved, and of the stipulations, both explicit and implicit, and of the necessity to present the corresponding testimony for the legal objectives deemed applicable. This writing was read in its totality to the person appearing before me, who finds it accurate, and approves, ratifies and signs it with me, the notary public, who gives faith to all the above stated. (f) O. TALAVERA S. (f) MOLINA. Notary.-

This occurred before me from the front of folio number forty-one to the reverse of folio number forty-three, from my present PROTOCOL NUMBER TWENTY-ONE, that I have in the present year. The testimony by which the Declaration was made, covered three usable pages of sealed legal paper, which was signed, sealed, and dated, in the city of Managua, at two thirty in the afternoon on the twentieth of May, 2008.

CR 2009/2*

International Court of Justice | **Cour internationale de Justice**

THE HAGUE | **LA HAYE**

YEAR 2009

Public sitting

held on Monday 2 March 2009, at 10.15 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua)**

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le lundi 2 mars 2009, à 10 h 15, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)**

COMPTE RENDU

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*Reissued for technical reasons.

Present: President Owada
Judges Shi
Koroma
Al-Khasawneh
Buergenthal
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Judge *ad hoc* Guillaume

Registrar Couvreur

The Government of the Republic of Costa Rica is represented by:

H.E. Mr. Edgar Ugalde-Alvarez, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit International; Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

as Counsel and Advocates;

Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,

Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit International de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

The PRESIDENT: Please be seated. The sitting is open.

The Court now meets, pursuant to Articles 43 *et seq.* of its Statute, to hear the oral arguments of the Parties in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*.

I recall initially that Vice-President Tomka is unable to take his seat on the Bench today. Judge Simma, for reasons explained under Article 24, paragraph 1, of the Statute, has informed the President that he is not sitting in this case.

I recall that, since the Court does not include upon the Bench a judge of the nationality of either of the Parties, pursuant to Article 31, paragraph 3, of the Statute, Nicaragua chose Mr. Gilbert Guillaume to sit as judge *ad hoc* in the case and Costa Rica initially chose Mr. Cançado Trindade. Mr. Cançado Trindade was subsequently elected as a Member of the Court. Costa Rica informed the Court that it had decided not to choose a new judge *ad hoc*.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that Mr. Gilbert Guillaume has been a permanent judge and a judge *ad hoc* of this Court and has already made solemn declarations in these capacities, Article 8, paragraph 3, of the Rules of Court provides that he must make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of Mr. Guillaume before inviting him to make his solemn declaration.

Mr. Gilbert Guillaume, of French nationality, has a degree in law and a postgraduate diploma in political economy and economic science from the University of Paris; he also holds a diploma from the Paris *Institut d'études politiques* and is an alumnus of the *Ecole nationale d'administration*. An eminent jurist, he has combined the careers of judge and senior official at national and international level. Mr. Guillaume is an honorary member of the French Council of State, after having served as a Councillor of State. He was France's representative on the Legal Committee of the International Civil Aviation Organization and, as such, Chairman of the

Committee from 1971 to 1975. He has served as the Director of Legal Affairs of the Organisation for Economic Co-operation and Development. Mr. Guillaume has been the Director of Legal Affairs at the French Ministry of Foreign Affairs and, in that capacity, acted, *inter alia*, as the Agent of France before the Court of Justice of the European Communities and the European Court of Human Rights. He was a Member of the International Court of Justice from 1987 to 2005 and President of the Court from 6 February 2000 to 5 February 2003. Mr. Guillaume has been chosen as judge *ad hoc* in the cases concerning *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* and *Maritime Dispute (Peru* v. *Chile).* A member of the Permanent Court of Arbitration since 1980, Mr. Guillaume has sat as arbitrator in a large number of disputes. He has also published extensively on a wide range of topics in international law.

I shall accordingly invite Mr. Guillaume to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

M. GUILLAUME :

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declaration made by Mr. Guillaume and declare him duly installed as judge *ad hoc* in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua).*

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I shall now recall the principal steps of the procedure so far followed in this case.

On 29 September 2005 the Republic of Costa Rica filed in the Registry of the Court an Application of the same date instituting proceedings against the Republic of Nicaragua with regard to a "dispute concerning navigational and related rights of Costa Rica on the San Juan River".

In its Application, Costa Rica sought to found the jurisdiction of the Court on the declaration of acceptance of the Court's jurisdiction, under Article 36, paragraph 2, of the Statute, made by

Costa Rica on 20 February 1973 and the declaration made by Nicaragua on 24 September 1929 under Article 36 of the Statute of the Permanent Court of International Justice, which is deemed, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute. Costa Rica also invoked as a basis of the Court's jurisdiction the Tovar-Caldera Agreement signed between the Parties on 26 September 2002 as well as the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the "Pact of Bogotá".

In conformity with Article 40, paragraph 3, of the Statute of the Court, all States entitled to appear before the Court were notified of the Application.

Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute of the Court.

By an Order dated 29 November 2005, the Court fixed 29 August 2006 and 29 May 2007, respectively, as the time-limits for the filing of the Memorial of Costa Rica and the Counter-Memorial of Nicaragua; those pleadings were duly filed within the time-limits so prescribed.

By an Order of 9 October 2007, the Court authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua, and fixed 15 January 2008 and 15 July 2008 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

Referring to Article 53, paragraph 1, of the Rules of Court, the Government of Ecuador and the Government of the Republic of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that Article, the Court decided not to grant these requests. The Registrar communicated the Court's decision to the Government of Ecuador and the Government of the Republic of Colombia, as well as to the Parties.

By letter of 27 November 2008, the Agent of Costa Rica expressed his Government's desire to produce five new documents, in accordance with Article 56 of the Rules of Court. By letter of 10 December 2008, the Agent of Nicaragua informed the Court that his Government did not give its consent to the production of the requested documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules of Court, to authorize the production of four of the five documents submitted by Costa Rica, it being understood that Nicaragua would have the opportunity, pursuant to paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was communicated to the Parties by letters from the Registrar dated 18 December 2008.

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Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument.

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In this first sitting of the first round of oral argument, Costa Rica may, if so required, avail itself of a short extension of time beyond 1 p.m., in view of the time taken up by the earlier public sitting today. The first round of oral argument will close on Friday 6 March 2009. The second round of oral argument will begin on Monday 9 March 2009 and will close on Thursday 12 March 2009.

Costa Rica, which is the Applicant in the case, will be heard first. I now give the floor to His Excellency Mr. Edgar Ugalde-Alvarez, Agent of Costa Rica. You have the floor, Sir.

Mr. UGALDE-ALVAREZ:

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you as the Agent of Costa Rica. This is the first case involving Costa Rica to be heard before the International Court of Justice. Costa Rica comes to this Court, first, because of our commitment to international law and our trust in the peaceful settlement of disputes. But we also come because repeated diplomatic and other attempts have not brought Nicaragua to respect Costa Rica's rights over the San Juan River. Costa Rica appears before this Court to finally settle a dispute over its navigational and related rights, and has come without preconditions or reservations.

2. The boundary between Costa Rica and Nicaragua was established by the 1858 Cañas-Jerez Treaty of Limits[1]. This Treaty allocated the waters of the San Juan to Nicaragua, leaving the boundary on the Costa Rican bank. But at the same time, and in the same article, it recognized important navigational rights for Costa Rica on the common course of the river. The 1858 Treaty followed a series of attempts at negotiating an agreement on these and other questions. It was concluded at a time when there was strong interest in constructing an inter-oceanic canal by way of the San Juan River and Lake Nicaragua; at that time, this route was preferred to that of the Panama Canal. Of course, the inter-oceanic canal along this Costa Rican/Nicaraguan route never eventuated, but this does explain why rights of use and transit on the river were so important to both States. They were also of great concern to the United States, which sought to ensure that the whole route of the canal lay within a single State.

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[1] Memorial of Costa Rica (MCR), Ann. 7.

3. This is the third time Costa Rica has needed to seek adjudication vis-à-vis Nicaragua to ensure respect for the 1858 Treaty. In 1870 Nicaragua began to challenge the validity of the Treaty. The dispute was referred to arbitration, together with 11 points of interpretation, all raised by Nicaragua in the same attitude of challenging what had been previously agreed. The resulting Award of 1888 by United States President Grover Cleveland affirmed the validity of the 1858 Treaty. It also confirmed and authoritatively interpreted the extent of Costa Rica's rights of use of the river, particularly in respect of revenue service vessels[2]. These rights were further specified by the Central American Court of Justice in 1916 in a case between Costa Rica and Nicaragua[3].

4. The rights of navigation and use of the river, formally recognized more than 150 years ago, continue to be vital to my country. The region contains nature reserves and protected areas on both sides of the river. The usual and most practical method of transport for all the riparians of the Costa Rican bank is by boat, including public transport and travel to school or to the market. The river is the only means of transport for the provision of essential social and public services, including health services. It is also used for transportation purposes in the growing tourist industry, as well as helping ensure the protection of nature reserves.

5. Since the 1990s Nicaragua has increasingly imposed serious restrictions on the navigation of Costa Rican vessels on the San Juan. As a result of Costa Rica's commencement of these proceedings, Nicaragua imposed still further restrictions, which in combination with its previous actions, have rendered Costa Rica's rights virtually empty of content. In these proceedings, Nicaragua has denied the existence of most of Costa Rica's rights. It has also argued that it is entitled to regulate Costa Rican navigation to such an extent as to deny the substance of Costa Rica's rights entirely. Every Costa Rican boat navigating on the river has to stop at every Nicaraguan army post. Fees are demanded, visas are demanded, clearance certificates have to be paid for. Officials may not travel on the river at all without prior permission. This is the antithesis of the perpetual freedom of navigation stipulated by the Treaty.

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[2] MCR, Ann. 16.

[3] MCR, Ann. 21.

6. In these proceedings Nicaragua has made several factual misrepresentations concerning Costa Rica. For example, Nicaragua has suggested that Costa Rica's police are a military force. This is not true. It is well known that the Costa Rican Constitution abolished the army: our only force, both in form and fact, is a civil police.

7. Nicaragua has also alleged that Costa Rica does not care about environmental protection[4]. But Costa Rica has an internationally recognized record in this field. In the 2008 Environmental Performance Index, prepared by the Universities of Yale and Columbia in collaboration with the World Economic Forum and the European Commission, Costa Rica ranked in fifth place, out of 149 countries. Nicaragua, incidentally, ranked 77[5]. More than 26 per cent of Costa Rica's national territory is protected through 166 wildlife protection areas.

8. Despite Nicaragua's breaches of Costa Rica's rights, Costa Rica has met each and every one of its obligations in respect of the San Juan, in so far as Nicaragua has not prevented it. In addition, Costa Rica has actively sought to settle the dispute in a manner consistent with respect for international law. These proceedings were brought *as a last resort* to seek a final and authoritative settlement.

9. Costa Rica comes to the Court acknowledging that Nicaragua has sovereignty over the San Juan. But Nicaraguan sovereignty was granted subject to Costa Rica's rights of navigation, and those Costa Rican rights must be upheld and fully respected.

10. Costa Rica requests that the Court grant appropriate remedies as a consequence of the internationally wrongful acts committed by Nicaragua; these remedies include the cessation of all Nicaraguan conduct which prevents the exercise and enjoyment of Costa Rica's rights on the San Juan, and which also prevents Costa Rica from fulfilling its responsibilities to safeguard, defend and protect the river and the common bay of San Juan del Norte. It is our hope that the decision of the Court will finally settle the dispute so that both Costa Rica and Nicaragua can return to fraternal and friendly relations on all fronts.

11. Mr. President, Members of the Court, let me now outline our programme for today. Mr. Arnoldo Brenes and Mr. Sergio Ugalde will in turn give you the geographical context and

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[4] Rejoinder of Nicaragua (RN), 1.14.

[5] http://epi.yale.edu/home.

analyse the origin and the scope of the dispute. The remainder of our pleading today will be devoted to explaining Costa Rica's treaty rights, through Professors Caflisch and Kohen.

12. Mr. President, Members of the Court, thank you for your attention. Mr. President, I would ask you to call on Mr. Arnoldo Brenes.

The PRESIDENT: I thank His Excellency, Mr. Edgar Ugalde-Alvarez. I now give the floor to Mr. Arnoldo Brenes.

Mr. BRENES: Mr. President, distinguished Members of the Court, it is a great honour to make my first appearance before you as counsel for Costa Rica.

GEOGRAPHICAL AND HISTORICAL CONTEXT

1. My first task is to introduce the geographical context of this case. Secondly, I will explain the historical reasons for the fact that the entire San Juan River does not constitute the border of Costa Rica and Nicaragua. Finally, I will refer briefly to the issue of the District of Nicoya, over which Nicaragua has spent so much misplaced energy.

Geographical and physical characteristics of the San Juan River

2. Costa Rica and Nicaragua lie in Central America, and share a border of 300 km, of which 141 km are constituted by the natural border of the San Juan River (tab 5 in judges' folder).

3.The San Juan River flows from Lake Nicaragua in a generally eastern direction to the Atlantic side, that is to say, to the Caribbean Sea, at a distance of about 205 km (tab 6 *(a)* in judges' folder).

4. Apart from Lake Nicaragua, the San Juan is fed mostly by Costa Rican tributaries. These account for approximately 70 per cent of the San Juan's total flow. The San Carlos and Sarapiquí Rivers are the most important tributaries. The San Juan River area is therefore an international basin, and the San Juan River an international river. Nicaragua has sovereignty over the left or northern bank of the river, as well as over the waters, while Costa Rica is sovereign over the right or southern bank of the river where it constitutes the international boundary. Moreover, both the Bay of Salinas at the Pacific and the Bay of San Juan del Norte in the Caribbean are under the sovereignty of both countries (tab 6 *(b)* in judges' folder).

5. By the early 1860s, the water flow of the lower reaches of the San Juan River was reduced and the port of San Juan del Norte had become silted up. Since that time, the majority of the waters of the San Juan River empties into the Caribbean through the Colorado River. The junction of the San Juan and Colorado Rivers is approximately 19.3 km upstream from the Caribbean. The Colorado River is entirely within Costa Rican territory. In its Rejoinder Nicaragua suggested that it is remarkable that this siltation and partial diversion happened shortly after the signing of the Treaty of Limits[6]. The insinuation is that this was Costa Rica's fault. In fact the immediate cause of this phenomenon, according to a well-known Nicaraguan historian, was an island located where the Colorado meets the San Juan, known as Leefe's Island. The island's cedar trees were cut down in 1857 by a British citizen, who had been granted the island by the Miskito King. In August 1858 the island itself was washed away, silting the San Juan in the direction of the Caribbean[7]. In any event there is absolutely no evidence that the change in flow patterns was caused by Costa Rica.

6. In the San Juan border area, Costa Rica has designated four wildlife refuges, which account for more than 15 per cent of Costa Rica's protected land. Unfortunately, Nicaragua's restrictions on Costa Rican public navigation on the San Juan have made it more difficult to properly monitor the state of these protected lands, since the only access to a great portion of this territory is through the San Juan River (tab 7 in judges' folder).

7. Contrary to Nicaragua's misrepresentations, there are no proper roads that provide access to most of the hamlets, small villages and police posts along the Costa Rican bank of the San Juan River[8]. Neither are there airplane landing strips in this area as Nicaragua claimed[9], save for the one in Barra del Colorado, which is on the Caribbean coast some 19 km from the Delta area, and completely inaccessible by land from that point. In this regard it must be noted that the affidavit of Nicaraguan Colonel Ricardo Sánchez, which claims that he has "observed that a highway is being

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[6] RN, 6.8.

[7] Bolaños Geyer, Alejandro *Campana, rota, camalotes, tumbas y olvido* (Masaya: Encuadernación Luis Gastón Cortés O., 1999), pp. 55-56.

[8] Counter-Memorial of Nicaragua (CMN), 5.2.9; RN, 5.98.

[9] CMN, 5.2.9; RN, 5.98.

built in [Costa Rican] territory, running parallel to the San Juan River"[10], does not reflect the truth (tab 8 in judges' folder).

8. Nicaragua claimed in its Rejoinder that "[r]oadways, whose construction began prior to 1998, now connect to all of the Costa Rican border and police posts, and facilitate supply and staff relief operations"[11]. In support of this claim, Nicaragua included in its Rejoinder a map produced by Ecomapas S.A., represented as "a Costa Rican firm"[12].

9. According to Nicaragua, this map "shows, in brown lines, the roads connected to Costa Rica's three border posts on the San Juan, at Boca San Carlos, Boca Sarapiquí, and Delta"[13]. An initial point is that Ecomapas is a private company and that this is not an official map. It was not possible to trace this company to verify its existence, because the telephone number which appears printed on the map is that of another unrelated party; its name is not listed in the telephone directory, nor does it appear on the internet. Secondly, the road that Nicaragua alleges this map depicts leading to the Delta Border Post[14] does not exist; in fact it corresponds to the Colorado River! The other two lines correspond to tracks which are only accessible during the short dry season, a fact which Nicaragua does not mention (tab 9 in judges' folder).

The San Juan River during colonial times

10. As I noted earlier, not all of the San Juan River constitutes the boundary between Costa Rica and Nicaragua. The boundary between the countries was determined in Article II of the 1858 Treaty of Limits. Of particular relevance is the first sentence of this Article, which establishes that:

> "The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo . . ."[15] (Tab 10 in judges' folder.)

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[10] CMN, Ann. 91, para. 2, p. 322; CMN, 5.2.9.

[11] RN, 5.98.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] Costa Rica-Nicaragua Treaty of Limits, 15 April 1858; Memorial of Costa Rica (MCR), Ann. 7 *(b)*.

11. After this point, the San Juan River ceases to be the boundary, and the dividing line runs south of the river and Lake Nicaragua, until it reaches the central point of the common Bay of Salinas in the Pacific.

12. The selection of "the point three English miles distant from Castillo Viejo", as reference for the limit where the San Juan ceases to be the border, relates back to the Spanish Royal Charter of 29 November 1540 to Diego Gutierrez for the conquest of Cartago, the name by which Costa Rica was known at the time[16]. According to this Royal Charter, the territory of the new Province of Cartago extended well to the north, up to the River Aguan west of Cape Camarón in present-day Honduras, and to the west to a point 15 leagues from the Lake of Nicaragua. The Charter also granted Diego Gutierrez a licence to enter and conquer the San Juan River, or the *Desaguadero* as it was known at the time, up to a point 15 leagues from the Lake of Nicaragua. After that point the San Juan was assigned to Nicaragua[17]. Furthermore, this Royal Charter established that "the navigation and fishing . . . in said river, and the said fifteen leagues and the lagoon that remain with Nicaragua shall be common" to both provinces[18] (tab 11 in judges' folder).

13. I should note that the league as a unit of measurement in the Spanish period was about 4.2 km. So the limit referred to in the 1540 Charter was some 63 km from Lake Nicaragua. An English mile is 1.6 km, so the point three English miles from Castillo Viejo is 64 km from Lake Nicaragua. Therefore "the point three English miles distant from Castillo Viejo" nearly coincides with the limit established as "within fifteen leagues of the lagoon of Nicaragua".

14. According to the 1540 Royal Charter, Costa Rica was not only assigned the territory which included the whole lower portion of the San Juan River, that is, from a point 15 leagues from its source in the lake down to its outlet on the Caribbean, but also a right in common with Nicaragua to use the lake and the entirety of the San Juan, including that part assigned to Nicaragua, for purposes of navigation and fishing[19]. The apportionment to Costa Rica of the lower

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[16] *Capitulación con Diego Gutierrez para la conquista de la Provincia de Cartago*, 29 November 1540; MCR, Ann. 1.

[17] *Ibid.*

[18] *Ibid.*

[19] *Capitulación con Diego Gutierrez para la conquista de la Provincia de Cartago*, 29 November 1540; MCR, Ann. 1.

course of the San Juan and its outlet to the Caribbean was affirmed in Royal Orders issued in 1541[20] and 1561[21].

15. Nicaragua's Counter-Memorial claims that "the 1540 Royal Charter was repealed and substituted by a new Royal Charter given by Emperor Phillip II to Diego de Artieda on 1 December 1573"[22]. According to Nicaragua, Article 12 of the 1573 Royal Charter "established very clearly that 'the mouth of the Desaguadero (or San Juan River) . . . belongs to Nicaragua . . .'"[23]. By implication, Nicaragua suggested, the entire San Juan River was assigned to it under this Charter.

16. This claim should be rejected. The original Spanish document does not attribute the mouths of the Desaguadero to Nicaragua. Defining the limits of Diego de Artieda's conquest of Costa Rica, the 1573 Charter reads: "por la parte del Norte, desde las bocas del Desaguadero, que *es* a las partes de Nicaragua . . ."[24]. Literally translated, this means "on the Northern part, from the mouths of the Desaguadero, which *is* in the parts of Nicaragua". The reference to "mouths" is in the plural, while the verb "is", Spanish "es", in the expression "que es a las partes de" is singular: it refers to the Desaguadero, as such, not to its mouths. Nicaragua's translation reads "from the mouths of the Desaguadero, that belong to Nicaragua"[25]. The Spanish singular "es" is incorrectly translated into the plural, so as to suggest that it refers to the mouths of the Desaguadero instead of the Desaguadero as such (tab 12 in judges' folder).

17. In truth, the Spanish "desde las bocas del Desaguadero, que es a las partes de Nicaragua" had the purpose of referring to the portion of the San Juan that in the 1540 Royal Charter and the 1541 Royal Order had already been assigned to Nicaragua, that is, 15 leagues towards the east from the lake. The 1573 Charter did not establish that the mouths of the San Juan River belonged to Nicaragua, nor did it suggest that the entire San Juan River was Nicaraguan.

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[20] *Real Provision de SS. MM. el Emperador y la Reina Doña Juana sobre los límites de la gobernación de Cartago, y en particular sobre los del Desaguadero ó Rio de San Juan de Nicaragua*, 6 May 1541; MCR, Ann. 2.

[21] *Titulo de Alcalde Mayor de las Provincias de Nueva Cartago y Costa Rica a favor del Licenciado Juan Cavallon — Limites de estas Provincias*, 17 May 1561; MCR, Ann. 3.

[22] CMN, 1.2.1; *Asiento y Capitulación que se tomó con el Capitán Diego de Artieda sobre el descubrimiento y población de la provincia de Costa Rica*, 1 December 1573; CMN, Ann. 86.

[23] CMN, 1.2.11.

[24] CMN, Original Documents deposited with the Registry, Part III, Ann. 86, para. 12.

[25] CMN, 1.2.10; CMN, Ann. 86 (p. 303).

18. This is confirmed in the 1576 Royal Order of the King of Spain to Diego López, which established a new Province of Lataguzgalpa by segregating its territory from Costa Rica. The limits of Lataguzgalpa were defined by reference to the mouth of the Desaguadero as "the whole land included from the mouth of El Desaguadero to the north up to Cape Camaron . . ."[26]. If the mouth of the Desaguadero and its entire length was assigned to Nicaragua in 1573, one would expect that the 1576 Order would make reference to Nicaragua in reassigning the mouth of the Desaguadero to Lataguzgalpa. The 1576 Order contains no such reference because the 1573 Charter did no such thing: the province of Lataguzgalpa was created by segregating its territory from Costa Rica (tab 13 in judges' folder).

19. In 1744, Costa Rica's territory was described as extending "from the north, from the mouths of the San Juan River until the Shield of Veraguas, at the Kingdom of Tierra Firme . . ."[27], which is in present-day Panama. These limits remained unchanged during the eighteenth century. After independence from Spain in 1821 these limits remained: they are reflected in Costa Rica's 1825 Constitution which included the mouth of the San Juan as its limit to the north[28].

20. Relying on its misrepresentation of the 1573 Royal Charter, Nicaragua argues that the "Royal Charter granted to Diego de Artieda in 1573, set the definitive territorial bases for the common border between Nicaragua and Costa Rica until their independence from Spain in 1821"[29]. Nicaragua further argues that this was the *uti possidetis iuris* that was reflected in Costa Rica's Constitution of 1825, which included "the mouths of the Desaguadero that belong to Nicaragua"[30]. It has been shown that these assertions are not true: the 1573 Royal Charter did not assign the mouths of the Desaguadero to Nicaragua, and this was not the *uti possidetis iuris* reflected in Costa Rica's Constitution of 1825.

21. In any case, the point described in 1540 as 15 leagues east of the Lake of Nicaragua coincides with the point 3 English miles from the Castillo Viejo mentioned in the 1858 Treaty of

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[26] *Real Cédula insertando una contrata para la población que se obligó a hacer el Capitán Diego López, de la Provincia de Lataguzgalpa o Nueva Cartago, en la Guatemala*, 10 February 1576; Reply of Costa Rica (RCR), Ann. 1.

[27] Report regarding the Province of Costa Rica, presented by Luis Diez Navarro to the Captain General of Guatemala; RCR, Ann. 28.

[28] MCR, Ann. 193.

[29] CMN, 1.2.11

[30] CMN, 1.2.22.

Limits. This confirms that Costa Rica's rights to the use of this portion of the San Juan River, as well as to the Bay of San Juan del Norte, can be traced back at least to 1540.

The issue of Nicoya

22. I turn to my third point, the issue of Nicoya. Nicaragua has repeatedly insisted that the *quid pro quo* for the 1858 Treaty, which balanced Nicaragua's acceptance that Nicoya belonged to Costa Rica, was Costa Rica's acceptance of Nicaragua's sovereignty over the San Juan. Thus it concludes that Costa Rica's navigational rights on the San Juan were of minimal importance and of a very restricted scope[31]. Nicaragua also accuses Costa Rica of "[taking] advantage of a civil war raging in Nicaragua and [annexing] an important part of Nicaragua called Nicoya"[32].

23. There is no basis for any of these claims. By the time of the 1858 Treaty, the incorporation of the district of Nicoya into Costa Rica had long been established. On 25 July 1824, by plebiscite, the people of Nicoya freely decided to join Costa Rica[33]. This decision was ratified by the Central American Federal Congress in 1825[34]. Between 1826 and 1854 it was reaffirmed by the people of Nicoya no less than seven times[35]. This was acknowledged by Nicaragua itself: Nicaragua's Constitution of 8 April 1826 already did not include Nicoya as part of its territory[36]. Neither did subsequent Nicaraguan constitutions. The 1858 Treaty marked the final acknowledgment by Nicaragua of the decision taken by the people of Nicoya to integrate into Costa Rica, a decision which was ratified by the Central American Federal Congress and recognized long before by Nicaragua itself[37]. By 1858 Nicoya was not the most relevant matter in the context of the drafting of the Treaty of Limits. Instead, the grant of sovereignty over the San Juan to Nicaragua was set alongside Costa Rica's perpetual right of free navigation, that right of navigation forming an integral part of the object and purpose of the 1858 Treaty, and in particular its Article VI.

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[31] CMN, 4.1.5; RN, 1.6.*(b)*, 2.8, 2.82, 3.5, 5.4, and App. xlviii.

[32] CMN, Introduction, para. 7.

[33] RCR, Ann. 3; RCR, A.17.

[34] RCR, Ann. 5; RCR, A.17.

[35] RCR, A.17.

[36] RCR, Ann. 65; RCR, A.18.

[37] RCR, A.19.

24. The circumstances of the conclusion of the 1858 Treaty indicate that the right of navigation was central to its object and purpose. The drafting and ratification of the 1858 Treaty was intimately connected with a Canalization Convention between Nicaragua, Costa Rica and Félix Belly[38]. That Convention, which contrary to Nicaragua's assertion[39] was ratified by both countries, expressly provided that the boundary line of the 1858 Treaty would be replaced by the canal once it was constructed, with Costa Rica and Nicaragua as its co-sovereigns[40]. The picture which emerges from the immediate context is that the 1858 Treaty was not only concerned with the settlement of the boundary, but that navigation on the San Juan was of particular importance, especially given the proposals for an inter-oceanic canal. Furthermore, although Nicaragua has suggested that the terms of the agreement reached in the 1858 Treaty were "very significant concessions"[41] towards Costa Rica, in reality the terms of the Treaty were "fully in accordance"[42] with the instructions given to the Nicaraguan negotiator, Mr. Máximo Jerez.

Conclusion

25. Mr. President, Members of the Court, it has been shown that throughout its written pleadings Nicaragua has devoted a great deal of time and energy mischaracterizing the early history of both countries, and particularly insisting on the relevance of the issue of Nicoya. In so doing, Nicaragua has attempted to distract the Court from the main issues in the present proceedings. The main questions before this Court are Costa Rica's navigational and other rights on the San Juan River, established in the 1858 Treaty of Limits, and Nicaragua's unlawful interference with them.

26. I thank you for your attention. Mr. President, may I ask you now to call on Mr. Sergio Ugalde.

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[38] MCR, Ann. 8; RCR Ann. 12. See also F. Belly, *A Travers L'Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), pp. 150-165, RCR, Ann. 66.

[39] RN, App. xxiii, xxiv and xxxiii.

[40] RCR, Ann. 12, Arts. 4, 25. See also Cyril Allen, *France in Central America: Félix Belly and the Nicaraguan Canal* (Pageant Press Inc.: New York, 1966) at pp. 37-38.

[41] CMN, Introduction para. 9; see also CMN, para. 2.1.37; RN, 2.19 and 2.103; RN, App. xxiv.

[42] Decree issued on 26 April 1858 by Tomás Martinez, President of Nicaragua, ratifying the 1858 Treaty of Limits, MCR, Ann. 207, p. 53.

The PRESIDENT: I thank Mr. Arnoldo Brenes for his presentation. I now give the floor to Mr. Sergio Ugalde.

Mr. UGALDE:

HISTORY AND EXTENT OF THE DISPUTE

Introduction

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you as counsel for Costa Rica in these proceedings. It is my task to give the Court an overview of the history of the dispute and to outline its extent. I will also examine certain evidence relied upon by Nicaragua.

History of the dispute

2. I turn to my first point. Prior to 1980, apart from occasional and sporadic incidents, Costa Rica exercised its perpetual right of free navigation on the San Juan River without interference. At the outset of the Nicaraguan Civil War of the 1980s, there were certain incidents[43], including the shooting at a Costa Rican Ministry of Health boat in 1980[44] and several incidents against Costa Rican vessels transporting tourists in 1982[45]. These actions were carried out by the Sandinista army. The Nicaraguan conflict resulted in more than 100,000 dead, and nearly 1 million people displaced, most of them as refugees in Costa Rica. As a result of the Nicaraguan Civil War Costa Rica was forced to suspend all navigation on the San Juan River, at a high cost to businesses and government, but particularly to the inhabitants of the region, who were forced to leave.

3. After peace returned in the late 1980s, communities and businesses began to repopulate the northern region of Costa Rica. Tourism started to pick up again, and by 1994 it had grown to

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[43] MCR, paras. 3.04-3.20.

[44] MCR, para. 3.05.

[45] MCR, para. 3.06.

the point where the number of tourists being transported through the San Juan River was in the hundreds per month[46].

4. It was during the 1990s that Nicaragua first began to systematically and progressively disregard Costa Rica's rights, a policy continued to the present day, and which has been further intensified and compounded since Costa Rica filed these proceedings before the Court.

5. In 1994 Nicaragua first began to impose charges on passengers navigating the San Juan River on Costa Rican vessels[47]. It was also at this time that Nicaragua first proposed its new interpretation of the Treaty of Limits of 1858 regarding navigation for purposes of commerce[48]. Then Nicaragua seriously aggravated the dispute on 14 July 1998. On that date it communicated its unilateral decision prohibiting navigation by Costa Rican police on the San Juan. This decision was communicated by a low-ranking Nicaraguan army soldier at a Costa Rican police post at the common border[49].

6. Nicaragua first justified the prohibition because Costa Rican police were navigating carrying their service arms[50]. Prior to 14 July 1998, Costa Rican armed public vessels had navigated on the San Juan in the exercise of treaty rights of navigation. Two weeks after the prohibition, Nicaragua's Minister of Defence and Costa Rica's Minister of Government, Police and Public Security signed the Cuadra-Lizano Joint Communiqué[51], which confirmed the long-standing practice of Costa Rican police navigation with arms and laid down modalities for its continuation[52]. The Cuadra-Lizano Joint Communiqué was subsequently declared null and void by Nicaragua[53], a declaration which has never been accepted by Costa Rica[54].

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[46] RN, Vol. 2, Ann. 73, p. 455.

[47] MCR, Vol. 5, Ann. 126.

[48] MCR, Vol. 3, Ann. 48.

[49] MCR, Vol. 6, Ann. 240.

[50] MCR, Annexes, Vol. 5, Ann. 133; see CMN, para. 1.3.44.

[51] MCR, Vol. 2, Ann. 28.

[52] *Ibid.*

[53] CMN, paras 3.2.11-12; CMN, Vol. 2, Ann. 68.

[54] MCR, Vol. 3, Ann. 50.

7. Recently Nicaragua has offered a new justification of its prohibition of police navigation. It argues that the dispute was triggered by Costa Rican police detaining Nicaraguans on the San Juan[55].

8. In support of this new argument, Nicaragua presented an affidavit by General Francisco Talavera[56]. His affidavit, which refers to alleged detentions by Costa Rican police officers on the river, does not provide any detail: it does not state the name of the Nicaraguans detained, the date, the time or location of the detention; nor does it specify the Costa Rican officials involved. General Talavera's is one of a number of affidavits annexed to Nicaragua's Rejoinder, even though all of the alleged incidents referred to in those affidavits occurred long before Nicaragua submitted its Counter-Memorial. None of these affidavits is supported by a single piece of documentary evidence.

9. In the time available and given that this evidence was only produced by Nicaragua at the last gasp, Costa Rica is significantly disadvantaged from a procedural point of view. But it has been able to provide the Court with affidavit[57] and documentary evidence which shows, by way of example, that Nicaragua's affidavit evidence is not reliable. General Talavera claims that "[u]pon assuming [his] responsibilities as Chief of the Southern Military Detachment" — on 29 October 2007 — he "had a meeting at [his] headquarters in San Carlos with [his] Costa Rican counterpart, Colonel Walter Navarro Romero"[58]. General Talavera also alleges that during the month of June 1998, "the Costa Rican *Guardia civil* . . . began to intercept Nicaraguan vessels carrying Nicaraguan passengers in Nicaraguan waters, based on the suspicion that they were planning to enter Costa Rica illegally"[59]. He states that on 7 July 1998, "a Nicaraguan boat, carrying the Minister of Tourism, was intercepted by two Costa Rican *Guardia Civil* boats" who "attempted to order the boat to detain its travels in order for the vessel to be searched"[60].

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[55] RN, paras. 5.85-5.91.

[56] RN, Vol. 2, Ann. 78.

[57] Ann. IV to letter filed 27 Nov. 2008.

[58] RN, Vol. 2, Ann. 78, p. 491.

[59] *Ibid*, p. 492.

[60] *Ibid.*, p. 492.

10. In fact, at the time the first alleged meeting took place Mr. Navarro was not the Director of the Costa Rican Public Force, nor was he holding any post within the Costa Rican police; he was on leave without pay[61]. This statement is confirmed by documentary evidence in the form of the Decree of Appointment, dated 9 May 1998, which appointed him Director of the Costa Rican Public Force[62] — more than half a year after he supposedly met with General Talavera[63]. In respect of General Talavera's claims that the Costa Rican police started detaining Nicaraguan citizens on the San Juan, Mr. Navarro denies any such practice, stating emphatically that General Talavera's claims are "absolutely false"[64]. Mr. Navarro notes further that "the Nicaraguan Government never issued any formal protest nor did any Nicaraguan citizen . . . ever formalize any judicial claim" in respect of this alleged practice[65]. Surely there would be documentary evidence of protests of what would have been serious incidents on the San Juan. Yet no such evidence has been produced. It is unfortunate that Costa Rica was not able to respond to these Nicaraguan affidavits in a more comprehensive way, but the evidence Costa Rica has been able to produce in the short time available demonstrates that these Nicaraguan affidavits are unreliable.

11. Furthermore Nicaragua's own account of this alleged incident concerning the Minister of Tourism is conflicting. In its Counter-Memorial, Nicaragua stated that "despite Nicaragua's withdrawal of permission, in 1998 the Ministry of Tourism of Nicaragua discovered a heavily armed Costa Rican patrol navigating on the lower San Juan River without permission from Nicaragua . . ."[66]. However, in its Rejoinder it states that the "last straw" which compelled it to prohibit Costa Rican police navigation was the attempted detention by Costa Rican police of the boat transporting the Minister of Tourism[67]. The Counter-Memorial had made no mention of any such incident; but by the time of the Rejoinder, seemingly the situation had deteriorated: the Costa Rican police had retrospectively attempted to arrest a Nicaraguan Minister! Once again, if

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[61] Ann. IV to letter filed 27 November 2008, para. 2.

[62] Ann. V to letter filed 27 November 2008.

[63] RN, Vol. 2, Ann. 78, p. 491.

[64] Ann. IV to letter filed 27 November 2008, para. 3.

[65] Ann. IV to letter filed 27 November 2008, para. 5.

[66] CMN, para. 6.1.11.

[67] RN, para. 5.89, p. 272.

Costa Rican police had attempted to board the boat carrying the Nicaraguan Minister of Tourism on the river, there would have been an immediate and strenuous protest Note from Nicaragua. There is no such Note, because this incident never happened.

12. To bolster its claim that there was a Costa Rican practice of detaining Nicaraguans on the San Juan, Nicaragua misrepresents a report dated 18 December 1998[68], which it claims showed that Costa Rican police had detained four Nicaraguan citizens on the river[69]. The report clearly shows that this incident occurred at "Post Delta #13 at Boca Tapada, Pital, San Carlos"[70], which, as you can see on this map, is located some 25 km inland from the San Juan River, inside Costa Rican territory. This incident provides no support at all for Nicaragua's unsubstantiated claim that the dispute originated in a Costa Rican practice of detaining Nicaraguans on the San Juan.

13. In addition, the Cuadra-Lizano Joint Communiqué, signed on 30 July 1998, made no reference at all to Costa Rican police detaining Nicaraguans on the river. One would expect that if this alleged practice was the true cause of the dispute, it would have been referenced either in the Agreement or in letters of protest. No such documents exist, because there was no such practice.

Efforts by Costa Rica to resolve the dispute

14. Immediately after Nicaragua's prohibition of Costa Rican police navigation in July 1998, Costa Rica sought to resolve the dispute diplomatically. At the outset, there were several high-level contacts, which resulted, as I have said, in the Cuadra-Lizano Joint Communiqué[71]. Under the circumstances, Costa Rica found the Agreement reached in the Communiqué acceptable. It affirmed Costa Rica's treaty right of navigation with public vessels and allowed for a good working relationship with Nicaragua. It provided for Nicaragua to be informed about Costa Rican police navigation, without detracting from Costa Rica's right to navigate freely and without interference. Despite the balance which the Communiqué achieved, Nicaragua decided to declare

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[68] MCR, Vol. 6, Ann. 227, p. 963.

[69] RN, para. 5.88.

[70] MCR, Vol. 6, Ann. 227, p. 963.

[71] MCR, Vol. 2, Ann. 28.

it null and void 11 days after it was signed, justifying this decision on the basis that "[p]ublic opinion was overwhelming against [implementation]" of the Agreement[72].

15. Despite this setback, Costa Rica has continued to seek every opportunity to resolve the dispute peacefully. Costa Rica suggested numerous options, including mediation by the Organization of American States[73], arbitration, or referral to a chamber of this Court[74]. None of these proposals were accepted; instead Nicaragua responded by imposing further restrictions on Costa Rican navigation on the San Juan.

16. On 23 October 2001, in an attempt to avoid accountability for its breaches of Costa Rica's rights, Nicaragua presented a reservation to its optional clause declaration. This reservation purported to exclude the jurisdiction of the Court in cases based on the interpretation of treaties or awards made before 31 December 1901[75]. This was clearly intended to exclude the possibility of a case being brought by Costa Rica, which would involve consideration of the Treaty of Limits and the Cleveland Award[76].

17. In 2002 Costa Rica still believed that a diplomatic solution could be obtained, prompting an agreement that would "freeze" the dispute for a period of three years[77], so that newly-elected Governments of each State could seek a bilateral solution. Unfortunately no resolution could be found. Under these circumstances, Costa Rica concluded that it had no alternative but to institute the present proceedings in the hope of a final and lasting solution[78].

18. Since Costa Rica filed the present Application, Nicaragua has demonstrated further hostility. On the day the Costa Rican Foreign Minister wrote to his Nicaraguan counterpart informing him of Costa Rica's decision to present this case to the Court[79], a Nicaraguan Presidential Decree entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters" was approved. This decree, *inter alia*, mandated

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[72] RN, para. 5.94.

[73] MCR, para. 3.36; MCR, Vol. 3, Ann. 60 and MCR, Vol. 5, Ann. 156.

[74] MCR, para. 3.47.

[75] MCR, Vol. 6, Ann. 231.

[76] MCR, Vol. 6, Ann. 232.

[77] MCR, para. 3.44; MCR, Vol. 2, Ann. 29.

[78] MCR, Vol. 3, Ann. 80.

[79] *Ibid.*

an increased presence on the San Juan by the Nicaraguan army and authorized the army to engage in a number of aggressive actions directed at Costa Rican police navigation on the river[80]. This decree clearly breached Article 9 of the Treaty of Limits, which provides that neither State "shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan river, or the Lake of Nicaragua"[81]. In its Rejoinder, Nicaragua accused Costa Rica of making "much fuss" about this Decree[82]. However, Costa Rica was understandably concerned given Nicaragua's history of firing at Costa Rican vessels navigating the river[83]. Nicaragua claimed that Costa Rica had omitted preambular paragraphs which "explain the motives for the decree"[84]. But Costa Rica reproduced the entire Decree in its Memorial[85]; indeed Nicaragua used Costa Rica's own translation of the very paragraphs it accuses Costa Rica of omitting[86]! Furthermore, those paragraphs do not provide any legitimate justification for this retaliatory Decree.

19. But Nicaragua did not stop there. Nicaraguan Colonel Ricardo Sanchez Mendez admitted that in 2005 Nicaragua intensified measures against Costa Rican navigation[87], requiring all Costa Ricans to obtain a visa to navigate on the San Juan[88] and requiring Costa Rican vessels to fly a Nicaraguan flag on the San Juan[89]. The visa was established as a substitute for a proposed tax on Costa Rican imports which was sought by the Nicaraguan Parliament[90]. The Nicaraguan Foreign Minister explained in 2005 the rationale for the change of plans about how to best punish Costa Rica. He stated that

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[80] RCR, Vol. 2, Ann. 69 (decree); MCR, Vol. 5, Anns. 182 and 183 (press reports).

[81] MCR, Vol. 2, Ann. 7 *(b)*, p. 51.

[82] RN, para. 5.31.

[83] MCR, paras 3.05 and 3.19.

[84] RN, para. 5.31.

[85] RCR, Vol. 2, Ann. 69.

[86] RN, para. 5.31.

[87] RN, Vol. 2, Ann. 77, p. 488.

[88] RN, para. 4.90; RCR, Vol. 2, Ann. 70.

[89] MCR, paras 5.83 – 5.91; CMN, para. 5.3.3

[90] Application by Costa Rica, Attachment 7.

> "We have to see what measures can be taken based on other points of view so it is not interpreted that we want to punish the Court for having accepted the case. What we could achieve with measures like [the Patriotic Tax] is to make the Court hostile."[91]

This statement was followed by an explanation by the Minister on the implementation of a visa instead, which would serve to pay the fees of Nicaragua's counsel in these proceedings. The Presidential Decree, which imposed the visa requirement, even made direct reference to the case filed by Costa Rica. The Decree states that:

> "The proceeds from the consular visa paid by Costa Ricans . . . will be allotted to the Ministry of Foreign Affairs as income . . . to pay for the expenses incurred in the defence before the International Court of Justice . . . for the case filed by . . . Costa Rica, in connection with navigation in the San Juan . . ."[92]

20. Thus, the dispute was aggravated by Nicaragua's retaliatory actions in response to Costa Rica seeking a peaceful resolution before the Court.

Extent of the dispute

21. I now turn to my second point. Subsequent to Nicaragua's prohibition of Costa Rica's police navigation, Nicaragua has systematically toughened existing restrictions and imposed further restrictions which affect all Costa Rican navigation on the San Juan River. In response to Costa Rica's filing of the present Application, Nicaragua has imposed other sanctions, including the requirement that Costa Ricans obtain a visa[93]; a prohibition on Costa Rican riparians engaging in subsistence fishing[94]; the recent decision to compel Costa Rican government officials to write letters requesting Nicaraguan permission to navigate the San Juan[95]; the imposition of restrictions on what Costa Rican towns Costa Rican travellers may visit[96]; and even restrictions on the amount of time they may stay in a riparian community in Costa Rican territory[97].

22. To summarize, Nicaragua's breaches of Costa Rica's rights include, but are not limited to:

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[91] MCR, para. 5.59; MCR, Vol. 5, Ann. 184.

[92] RCR, Vol. 2, Ann. 70, Art. 1, p. 352.

[93] RN, para. 4.90.

[94] MCR, para. 5.142; RCR, para. 4.57.

[95] RCR, Vol. 2, Anns. 55, 56, 57.

[96] RCR, para. 4.42; RCR, Vol. 2, Ann. 53.

[97] RCR, para. 4.44; RCR, Vol. 2, Ann. 52.

— the imposition of an obligation to land on the Nicaraguan bank and pay for a "departure clearance certificate";

— the imposition of other charges including tourist and immigration fees merely for transiting the river;

— searches of Costa Rican vessels and their passengers without any cause;

— a prohibition of navigation by Costa Rican police and restrictions on navigation by public service workers, with serious implications for the provision of health and social services and education to the riparians;

— an obligation to stop at every military post along the river where the navigation is common;

— timetables restricting Costa Rican navigation;

— limitations on the places on Costa Rican territory which can be visited while navigating the San Juan and limitations on the duration of those visits;

— limitations on free access to the Bay of San Juan del Norte;

— a requirement to fly the Nicaraguan flag when navigating on the San Juan;

— a requirement to carry a passport and a Nicaraguan visa to navigate on the San Juan; and

— a prohibition of fishing in the river for subsistence purposes, as a retaliatory measure for Costa Rica resorting to this Court.

Conclusion

23. Mr. President, Members of the Court, the history of the dispute confirms that the successive actions taken by Nicaragua have the ultimate purpose of suppressing altogether Costa Rica's rights, or at least, restricting them to the extent that they are rendered meaningless.

24. I thank you for your attention. Mr. President, I would ask you to call on Professor Caflisch.

The PRESIDENT: I thank Mr. Sergio Ugalde for his presentation. I am going to give the floor to Professor Caflisch. Professor Caflisch, before you start, given the time factor and given the long presentation that you are going to give to us, you might choose a point where you would like to have a very brief coffee break. Thank you.

M. CAFLISCH : Thank you.

LES DROITS CONVENTIONNELS DU COSTA RICA PLACÉS DANS LEUR CONTEXTE JURIDIQUE

Introduction

1. Monsieur le président, Messieurs les juges, je suis très sensible au privilège de pouvoir comparaître, pour la première fois, devant votre haute juridiction. Au cœur de l'affaire qui est devant vous aujourd'hui se trouve le traité Cañas-Jerez conclu entre le Costa Rica et le Nicaragua le 15 avril 1858. L'article VI de ce texte dispose que le Nicaragua exercera souveraineté et juridiction sur les eaux du fleuve San Juan, de sa sortie du lac Nicaragua jusqu'au point où il se jette dans la mer. Cette affirmation est suivie d'une restriction d'après laquelle

> «la République du Costa Rica aura toutefois un droit perpétuel de libre navigation sur lesdites eaux entre l'embouchure du fleuve et le point situé à trois milles anglais de Castillo Viejo, aux fins du commerce avec le Nicaragua aussi bien que du commerce avec l'intérieur du Costa Rica par la rivière San Carlos, la rivière Sarapiquí, ou toute autre voie de navigation, partant de la portion de la rive du fleuve San Juan déclarée par le présent traité appartenir au Costa Rica»[98].

2. La navigation en question est commune sur la partie du fleuve en aval du point mentionné à l'article VI du traité. De plus, ce n'est pas seulement de navigation pour accéder à la mer qu'il s'agit, comme semble le penser la Partie adverse[99], mais aussi de navigation avec le Nicaragua et de navigation intérieure au Costa Rica, par exemple le trajet San Carlos-San Juan-Sarapiquí. L'article VI du traité continue en disposant que les embarcations des deux pays peuvent accoster, comme elles l'entendent, sur chaque banc du fleuve San Juan, dans la partie où la navigation est commune ; et aucune taxe ne peut être prélevée, sauf avec le consentement des deux gouvernements.

3. L'article VI est loin d'être la seule disposition du traité se rapportant au San Juan. En effet, l'article IV prévoit que les eaux situées à l'un ou à l'autre bout de la frontière — dans les baies de Salinas (à l'ouest) et de San Juan del Norte (à l'est) — appartiennent en commun aux deux nations. Cela explique — et je cite l'article IV — pourquoi «les avantages découlant de leur

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[98] Texte anglais : «but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiqui, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica».

[99] Duplique du Nicaragua (DN), vol. I, 1.6.f, 1.10, 2.17, 3.16, 3.19, 3.20, 3.52, 3.93, 3.96, 4.3, 4.8, 4.9.

utilisation autant que l'obligation de les défendre sont communs aux deux Etats». Ceux-ci doivent participer de façon égale à la défense du fleuve en cas d'agression extérieure avec toute l'efficacité possible («con toda la eficacia que estuviese a su alcance») ; le Costa Rica a ainsi l'obligation de contribuer à la protection et sauvegarde du San Juan.

4. A l'article VIII du traité, le Nicaragua s'engage à recueillir l'avis du Gouvernement costa-ricien avant de souscrire à de nouveaux arrangements concernant des contrats de canalisation ou de transit. C'est précisément le non-accomplissement de ce devoir, plus de cinquante ans plus tard, qui a obligé le Costa Rica à saisir la Cour de justice centraméricaine (CJCA).

5. D'après la Partie adverse, le traité Cañas-Jerez est un traité de paix et de délimitation[100]. Il aurait pour objet principal sa souveraineté sur le fleuve, les droits de navigation du Costa Rica étant situés à l'arrière-plan, ces droits n'ayant pas le caractère de contreprestation par rapport à la souveraineté. Le vrai échange de prestation et de contreprestation serait, toujours selon la Partie adverse, la souveraineté du Nicaragua sur le fleuve contre sa reconnaissance de la souveraineté du Costa Rica sur la province de Nicoya.

6. Cette argumentation vise à réduire la dimension du droit de navigation du Costa Rica prévu à l'article VI du traité : ce droit serait *subordonné* à la souveraineté du Nicaragua sur les eaux et le lit du fleuve, ce qui signifierait que l'Etat défendeur jouirait d'une grande liberté dans l'interprétation et l'application du droit.

7. La thèse de la Partie adverse — échange entre la souveraineté sur le cours d'eau et reconnaissance de la souveraineté sur Nicoya — paraît peu convaincante (en effet, pourquoi le Costa Rica ferait-il un pareil sacrifice pour une souveraineté acquise depuis longtemps ?). La thèse qui voit dans la souveraineté nicaraguayenne sur le fleuve l'élément principal du traité de 1858, le droit de la navigation étant purement accessoire, ne convainc pas davantage. Comme le montre la description que je viens de faire de l'accord de 1858, on ne se trouve pas devant un simple traité qui, au terme d'un conflit, arrête une frontière ; c'est d'un véritable *régime* frontalier et fluvial qu'il s'agit : tracé de la frontière sur la berge costa-ricienne, droits de navigation communs sur une partie du cours d'eau et droit de débarquer des deux côtés du fleuve, *condominia* sur les baies à l'un et

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[100] *Ibid.*, vol. I, 2.46.

l'autre bout de la frontière, défense commune du fleuve, interdiction d'accomplir des actes hostiles dans le port de San Juan del Norte, sur le fleuve ou sur le lac Nicaragua en cas de guerre entre les riverains, devoir, enfin, de consultation en cas de travaux de canalisation. Un tel régime est incompatible avec l'argument de la Partie adverse, qui veut minimiser le statut concédé au Costa Rica pour l'utilisation et la gestion du fleuve et qui vise surtout à minimiser un droit de navigation qui, depuis un certain temps, se contracte comme une peau de chagrin et se transforme en un droit purement nominal, une enveloppe vide, en somme. Or l'article VI du traité de 1858 et le contexte dans lequel il est placé montrent que c'est d'un véritable *droit*, d'un droit *effectif* qu'il s'agit, et non d'un «droit» dont les contours seraient déterminés par une seule Partie, le Nicaragua. Par droit *effectif*, il faut entendre un droit susceptible d'être exercé sans entraves, sans égard aux états d'âme du Nicaragua ; d'un droit conventionnel donc qui ne consiste pas en des privilèges susceptibles d'être modifiés ou annulés unilatéralement au gré du pays qui détient la souveraineté sur les eaux et le lit du fleuve. Monsieur le président, j'aimerais maintenant dire quelques mots sur le traité Cañas-Jerez en tant que régime fluvial.

Le traité Cañas-Jerez en tant que régime fluvial

8. Monsieur le président, Messieurs les juges, les limites fluviales à la rive sont des frontières naturelles de caractère linéaire ; elles sont relativement précises, surtout si l'instrument qui les arrête précise le niveau des eaux à prendre en compte pour les fixer. Elles permettent au territoire de chaque Partie d'être contigu au cours d'eau ; mais une seule Partie détient la souveraineté sur les eaux et le lit du fleuve. L'autre Partie, en l'espèce le Costa Rica, est condamnée au rôle de spectateur si aucun ajustement n'intervient.

9. S'agissant de cours d'eau *non navigables* — comme le Doubs et le Foron sur une partie de la frontière franco-suisse —, cela signifie que l'utilisation du fleuve est réservée à l'un des riverains, à moins que le traité pertinent ne modifie ce résultat.

10. Les cours d'eau *navigables* présentent des difficultés comparables, qui peuvent être surmontées par des moyens analogues — des accommodements attribués à l'Etat dont la rive forme la frontière, par exemple la stipulation d'un droit «perpétuel» de libre navigation, comme dans la présente affaire. Si aucun ajustement de ce type n'intervient, des conflits risquent d'éclater. Ainsi

les armes ont parlé, on le sait, entre l'Iran et l'Iraq à propos du Chatt-el-Arab, dont la plus grande partie, comprenant le *thalweg* principal du cours d'eau, avait été attribuée à l'Irak par le traité de frontière de 1937. Ce traité ayant été unilatéralement «abrogé» par l'Iran en 1969, un nouvel accord fut conclu en 1975 qui fixa la frontière au *thalweg*. Malheureusement, cette nouvelle frontière devint, à son tour, en 1980, la victime d'une abrogation unilatérale, cette fois par l'irak. Il semble qu'à présent la frontière de 1975 — celle du *thalweg* — soit à nouveau applicable entre les deux Etats[101]. On mentionnera, enfin, la frontière à la rive dont il s'agit dans la présente affaire, encadrée par le régime conventionnel que l'on sait.

11. En faisant ces quelques observations générales sur la limite à la rive, j'ai voulu démontrer que cette technique de délimitation est relativement ancienne, qu'elle est inique dans son principe si elle n'est pas accompagnée de tempéraments *effectifs* offerts au riverain désavantagé, et qu'elle est apte à générer contestations et conflits. Disons-le clairement : dans la présente affaire, le Costa Rica ne cherche à provoquer ni les unes ni les autres. Il cherche à faire respecter l'équilibre établi en 1858, et à rétablir l'effectivité d'un droit de navigation malmené au cours de ces dernières années. Il ne recherche aucun changement de l'ordre existant, mais à obtenir ce à quoi il a droit.

12. On en vient ainsi *à conclure* que l'instrument de 1858 n'est pas un simple traité de *délimitation de frontières*, mais un instrument établissant un *véritable régime frontalier*. Si l'un des Etats se voit attribuer la souveraineté territoriale sur le cours d'eau, l'autre y jouit d'un droit perpétuel de libre navigation «aux fins du commerce» ; il s'agit donc d'une souveraineté qui *comporte des limites*.

13. Pour ce qui est du droit de navigation lui-même, rien ne permet d'affirmer qu'il est *subordonné* à la souveraineté du Nicaragua. S'il est vrai que le droit de navigation fait lui-même l'objet de limitations, il n'en découle aucune nécessité de donner à ce droit une interprétation soit restrictive soit extensive. Et même s'il existait une règle suivant laquelle les restrictions à la souveraineté (ici territoriale) s'interprètent restrictivement, il serait douteux qu'elle soit applicable à l'espèce. Je reviendrai sur ce point à la fin de mon intervention.

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[101] C. Symmons, «L'échange de lettres de 1990 entre l'Irak et l'Iran : Un règlement définitif du différend et du conflit?», *Annuaire français de droit international*, vol. 36, 1990, p. 229-247.

14. La garde du fleuve est confiée aux deux Etats ; la voie navigable commune débouche sur une baie — celle de San Juan del Norte — qui forme un *condominium* ; c'est l'article IV qui nous le dit. Et, si le Nicaragua, détenteur de la souveraineté territoriale, devait s'aviser de construire ou faire construire un canal qui se substituerait à la voie navigable naturelle, il devrait recueillir l'avis de l'autre Etat concerné, le Costa Rica ; c'est l'article VIII qui nous le dit.

15. Au cours de son histoire, ce régime semble être devenu gênant et irritant pour le Nicaragua, qui s'est mis à mettre en doute sa validité (cette sorte de doutes semble être une spécialité de nos voisins du nord) et à se poser des questions sur le régime de la navigation du fleuve. Ces doutes et questions ont abouti à la conclusion de la convention du 24 décembre 1886 pour déterminer par l'arbitrage la validité du traité de frontières de 1858[102], puis à la sentence arbitrale du président Cleveland du 2 mars 1888[103].

La sentence du président Cleveland

16. Monsieur le président, Messieurs les juges, je me tourne maintenant vers la sentence arbitrale rendue en 1888 par le président Cleveland. Le mandat confié à l'arbitre portait en premier lieu sur les doutes éprouvés par le Nicaragua au sujet de la validité du traité de 1858. Si celui-ci devait être jugé valable — ce qu'il fut —, la deuxième question était celle de savoir si le Costa Rica était en droit de faire circuler des navires de guerre sur le fleuve San Juan. A cette seconde question, l'arbitre répond ceci :

> «la République du Costa Rica, en vertu dudit traité et des dispositions de son article VI, n'a pas le droit de naviguer sur le fleuve San Juan avec des bateaux de guerre, mais elle peut naviguer sur ledit fleuve avec des bateaux du service des douanes dans l'exercice du droit d'usage de ce fleuve «aux fins du commerce» que lui reconnaît ledit article, ou dans les cas nécessaires à la protection de ce droit d'usage».

17. L'arbitre examine ensuite onze autres questions soulevées par le Nicaragua, dont certaines — et les réponses qui s'y rapportent — peuvent intéresser ici.

18. Les questions 4 et 5 touchent au point de savoir si le Costa Rica est tenu de participer aux frais encourus pour maintenir ouverte la baie de San Juan del Norte. M. Cleveland répond par la négative.

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[102] Mémoire du Costa Rica (MCR), vol. 2, annexe 14.

[103] *Ibid.*, annexe 16.

19. La sixième question portait sur le droit du Nicaragua de procéder à la construction d'ouvrages d'assainissement sur le fleuve. L'arbitre exposa que le Nicaragua avait effectivement ce droit, en précisant toutefois : i) que les ouvrages en question ne devaient pas causer d'atteinte au territoire du Costa Rica, ni causer de dommages à ce territoire et ii) que ces ouvrages ne devaient pas rendre impossible ou sérieusement affecter la navigation sur le fleuve ou les branches de celui-ci à un endroit quelconque où le Costa Rica jouissait de droits de navigation.

20. La huitième question concernait la déviation d'eaux du San Juan. Selon M. Cleveland, le Costa Rica pouvait s'opposer à de tels prélèvements si cela risquait de mettre fin ou de porter une sérieuse atteinte à la navigation sur le fleuve ou sur une branche quelconque de celui-ci où le Costa Rica était en droit de faire naviguer ses embarcations.

21. Les questions 10 et 11 avaient trait aux droits du Costa Rica au cas où le Nicaragua accorderait des concessions pour construire un canal à travers son territoire — hypothèse qui se réalisera un quart de siècle plus tard avec le traité Bryan-Chamorro. L'arbitre constate que le Nicaragua ne peut accorder de telles concessions sans préalablement solliciter l'avis du Costa Rica, conformément à ce qui est prévu à l'article VIII du traité Cañas-Jerez. Et cet avis n'est pas purement «consultatif». Le consentement du Costa Rica est nécessaire, et celui-ci peut demander une indemnisation. Il ne peut pas, en revanche, demander à partager les profits que le canal apportera au Nicaragua[104].

22. La sentence arbitrale de 1888 confirme ce qui a été dit sur la nature du traité de 1858, à savoir : i) qu'il ne s'agit pas d'un simple traité de délimitation de frontières, mais d'un accord établissant un véritable *régime* du fleuve San Juan ; ii) qu'il n'y a aucune *subordination* du droit à la navigation du Costa Rica à la souveraineté territoriale du Nicaragua ; iii) que, vu cette absence de hiérarchie et la protection dont l'arbitre entoure le droit de navigation, il est évident qu'il s'agit d'un droit *effectif* qui ne peut être interprété au gré du seul souverain territorial.

23. Toujours à propos de la navigation, on notera que l'arbitre, vu la teneur de l'article VI et sans doute aussi dans le but de prévenir incidents et conflits, exclut la navigation de «navires de guerre» costa-riciens. «Navires de guerre», dit l'arbitre, et «navires de guerre» est ce qu'il entend

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[104] *Ibid.*, p. 100.

dire. La Partie adverse semble penser que tout ce qui porte des armes et qui bouge dans un fleuve est un navire de guerre et doit être banni du cours d'eau, y compris les modestes embarcations du service fiscal du Costa Rica dont vous voyez projetés quelques spécimens[105]. Selon l'arbitre, ces embarcations ont le droit de circuler sur le fleuve dans la mesure où elles servent à sauvegarder et à protéger le droit de navigation aux fins du commerce, consacré par l'article VI du traité Cañas-Jerez.

Monsieur le président, si vous voulez déclarer une brève pause, ce serait un excellent endroit pour le faire.

The PRESIDENT: Thank you, Professor Caflisch. I indeed feel that we ought to have a very short break for ten minutes and meet again.

The Court adjourned from 11.45 to 11.55 a.m.

The PRESIDENT: Please be seated. Professor Caflisch, now you may continue.

Mr. CAFLISCH: Thank you very much.

Le jugement de la Cour de justice centraméricaine de 1916

24. Monsieur le président, Messieurs les juges, le jugement rendu par la Cour de justice centraméricaine (CJCA) le 30 septembre 1916, que je vais commenter maintenant, était la conséquence de la conclusion des traités Weitzel-Chamorro, le 8 février 1913, et surtout du traité Bryan-Chamorro, le 5 août 1914. Aux termes de l'article premier de ce dernier traité, les Etats-Unis se voient octroyer en perpétuité les droits de propriété nécessaires et souhaitables pour assurer la construction et le fonctionnement d'un canal interocéanique le long du San Juan et dans le lac Nicaragua, ou passant par toute autre route sur le territoire nicaraguayen. L'article II du traité Bryan-Chamorro prévoit un bail territorial renouvelable de quatre-vingt-dix-neuf ans sur deux îles de la mer des Caraïbes et permet aux Etats-Unis d'établir, également pour quatre-vingt-dix-neuf ans, une base militaire sur la rive nicaraguayenne de la baie de Fonseca.

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[105] MCR, vol. I, p. 78, 84 et 86.

L'article III, enfin, dispose que pour ces prestations, les Etats-Unis vont verser au Nicaragua la somme de trois millions de dollars.

25. Le Costa-Rica, auquel la conclusion des traités Bryan-Chamorro et Weitzel-Chamorro avait été soigneusement cachée, de même qu'au Salvador, saisirent la CJCA. Devant cette Cour, le Costa Rica affirma que le Nicaragua avait conclu le traité Bryan-Chamorro sans solliciter son avis, en violation notamment de l'article VIII du traité Cañas-Jerez qui lui en avait pourtant fait l'obligation, et que le traité de 1914 portait atteinte aux droits attribués au Costa Rica par le traité Cañas-Jerez.

26. Dans son jugement du 30 septembre 1916[106], la CJCA commence par affirmer sa compétence, qui avait été mise en doute par le Nicaragua. Se tournant vers le fond de l'affaire, la Cour, faisant référence à la sentence Cleveland, constate que si le Nicaragua jouit «de la possession exclusive et de la plus haute souveraineté» sur toute l'étendue du fleuve San Juan, cette possession et cette souveraineté ne sont pas exclusives mais limitées par les restrictions résultant du traité de 1858, à savoir :

1. la propriété commune des baies formant les points terminaux du canal à construire ;
2. l'obligation commune des *deux* Etats de défendre le fleuve San Juan en cas d'agression extérieure ; et
3. le droit perpétuel de libre navigation concédé au Costa Rica, accompagné du droit de celui-ci de faire mouiller ses embarcations à la rive nicaraguayenne (et droit du Nicaragua d'en faire de même sur la rive costa-ricienne) sans payer de taxes[107].

27. Il en découle, poursuit la Cour, que la propriété du Nicaragua sur le fleuve «n'est ni absolue ni illimitée» ; elle est

> «nécessairement restreinte par les droits de libre navigation et les droits connexes si clairement conférés au Costa Rica, à fortiori si l'on considère que ces droits, exercés a des fins douanières et de défense sont, selon l'opinion des hommes d'Etat, habituellement confondus dans leur développement avec les pouvoirs souverains de l'*imperium*. Une telle concession équivaut à un droit réel d'usage perpétuel et inaltérable, lequel établit la République du Costa Rica dans la pleine jouissance de la

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[106] MCR, vol. 2, annexe 21, p. 122.

[107] *Ibid.*, p. 160.

> propriété de fait du fleuve San Juan, sans préjudice de la pleine propriété réservée au Nicaragua en tant que souverain du territoire.»[108]

28. La CJCA, après avoir ainsi paraphrasé et caractérisé la sentence Cleveland, constate que celle-ci affirme la validité du traité Cañas-Jerez de 1858 et poursuit en disant ceci :

> «les droits de navigation sur le fleuve San Juan, qui ont été confirmés en faveur du Costa Rica, ne s'étendent pas aux navires de guerre mais concernent simplement les navires utilisés à des fins douanières et de défense — une interprétation qui n'ôte rien à l'opinion exprimée en ce qui concerne la propriété de fait revenant en grande partie au Costa Rica sur le fleuve San Juan parce que, la navigation des navires de guerre, outre qu'elle constitue une cause d'inquiétude, impliquerait une fonction relevant de la souveraineté territoriale».[109]

29. Puis la Cour mentionne l'obligation, mise à la charge du Nicaragua, de ne pas conclure de nouveaux contrats pour la construction d'un canal dans le secteur du San Juan sans d'abord solliciter l'avis du Costa Rica.

30. La CJCA se penche ensuite sur le traité Bryan-Chamorro. Son examen renferme un résumé du régime résultant du traité de 1858 et de la sentence Cleveland qui tient en trois points :

1. propriété commune des baies de San Juan del Norte et de Salinas ;
2. «droit conventionnel de navigation perpétuelle *[sic]* ...» sur le parcours identifié à l'article VI du traité Cañas-Jerez, droit qui est «accompagné du privilège complet de transit et de commerce, ce qui signifie que le Nicaragua *a le devoir de ne pas mettre d'obstacles à la navigation*, mais, au contraire, d'assurer que le cours du fleuve demeure ouvert» ;
3. droit des navires de chaque Etat, dans la zone de navigation commune, d'accoster sur la berge de l'autre Etat et devoir de contribuer à la défense du fleuve contre un ennemi extérieur, ce

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[108] *Ibid.*, p. 161. Texte anglais :

> «[it is] necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica — the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium* ; such a concession is equivalent to a real right of use, perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory».

[109] *Ibid.* Texte anglais :

> «the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes — an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty».

devoir devant être rempli avec toute l'efficacité possible («with all the efficiency within their reach»)[110].

31. Voilà pour le jugement de 1916, qui confirme en tous points la sentence du président Cleveland et qui montre de la façon la plus claire possible que les droits sur le fleuve San Juan sont *partagés* — en matière de défense aussi bien que dans d'autres domaines, notamment celui de la navigation ; il est même question de «droits de *propriété* d'ordre pratique» du Costa Rica. Le contrôle sur le fleuve exercé par le Nicaragua n'est donc *ni absolu ni illimité*. S'il est vrai que le Nicaragua exerce la souveraineté territoriale sur le fleuve, il doit le faire dans le respect des droits de l'Etat voisin.

32. Dans sa duplique dans la présente affaire, l'Etat défendeur prétend que le jugement rendu en 1916 par la CJCA «n'a aucune pertinence pour la présente affaire»[111]. Il ne concerne pas, selon lui, l'étendue des droits de navigation du Costa Rica sur le fleuve San Juan, mais la conclusion d'un accord — le traité Bryan-Chamorro — entre le Nicaragua et les Etats-Unis ayant trait à la construction d'un canal interocéanique. Dans l'affaire de 1916, le Costa Rica avait fait valoir que le traité Bryan-Chamorro avait été conclu en violation de l'article VIII du traité Cañas-Jerez et de la sentence du président Cleveland. Ainsi tout ce qui, dans le jugement, se rapporte à d'autres droits prévus pour le Costa Rica en 1858 ou dans la sentence Cleveland — notamment au droit de navigation — aurait le caractère d'affirmations générales ou d'*obiter dicta* et ne saurait donc être considéré comme ajoutant quoi que ce soit à ce qui avait été dit en 1858 et 1888.

33. En outre la Partie adverse minimise la portée du jugement de 1916 en mettant en doute l'impartialité et l'indépendance de la Cour. Elle expose que les membres de cette Cour étaient considérés, non pas comme des fonctionnaires internationaux («officials») des cinq Etats parties, mais seulement de leur pays d'origine ; ils auraient donc jugé en fonction de leurs intérêts nationaux[112].

34. Ces arguments, Monsieur le président, peuvent paraître étranges. Il est évident, pour commencer par le premier, que l'affaire de 1916 avait un lien étroit, entre autres, avec la question

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[110] *Ibid.*, p. 163.

[111] DN, vol. I, par. 2.124.

[112] *Ibid.*, par. 2.128.

des droits de navigation du Costa Rica. C'est en effet l'existence de ces droits, prévus à l'article VI du traité Cañas-Jerez et interprétés en 1888 par le président des Etats-Unis, qui justifie la présence de l'article VIII, notamment l'affirmation selon laquelle, lorsque les termes du traité à conclure portent atteinte aux «droits naturels» du Costa Rica, l'avis de celui-ci a force obligatoire ; et le droit «perpétuel» de libre navigation fait indubitablement partie de ces «droits naturels». C'est pour cette raison que la CJCA s'est penchée — a dû se pencher — sur les droits de navigation du Costa Rica.

35. Il est vrai que le jugement de 1916 ne pouvait — comme l'affirme le Nicaragua — élargir les droits stipulés en 1858. La sentence arbitrale de 1888 ne pouvait pas davantage le faire ; mais elle pouvait *interpréter* les stipulations de l'instrument de 1858. En 1916, la situation était la même, sauf que l'affaire portait *directement* sur l'interprétation de l'article VIII — déjà examinée en 1888 — et que cette interprétation pouvait dépendre de celle donnée à l'article VI du traité de 1858 sur la navigation. Il est par ailleurs certain que la CJCA ne serait pas entrée dans ces considérations si elles n'avaient revêtu aucun intérêt pour l'affaire de 1916. Ainsi, ce que cette Cour a dit sur le droit de navigation ne peut certainement pas être qualifié d'inutile. Et, même s'il ne s'agissait, comme le veut la Partie adverse, que d'affirmations générales ou d'*obiter dicta*, le fait qu'une affirmation est faite *obiter* ne signifie nullement qu'elle est sans valeur.

36. Parmi les affirmations faites dans le jugement de 1916, et qui sont particulièrement pertinentes pour la présente affaire, figurent des passages où la CJCA parle du «privilège *complet de transit et de commerce*», expression qui signifierait que le Nicaragua «a le *devoir de ne pas mettre d'obstacles à la navigation*» ; ou encore des passages disant que *la souveraineté du Nicaragua sur le fleuve n'est ni absolue ni illimitée*, mais qu'elle est restreinte par le «privilège complet» de transit et de commerce du Costa Rica ; ou, enfin, le passage faisant référence aux *droits exercés en matière fiscale et de défense*, considérés comme étant liés au droit de libre navigation.

37. Quant au second argument invoqué par le Nicaragua pour minimiser la portée du jugement de 1916 — celui du manque d'impartialité et d'indépendance de la Cour de justice centraméricaine —, le meilleur moyen de le réfuter est, sans doute, un examen de la qualité du jugement. Ce dernier est parfaitement motivé ; et il me paraît juste dans ses conclusions. La Cour

a, en particulier, résisté à la tentation de déclarer nul le traité Bryan-Chamorro, expliquant que celui-ci était intervenu entre un Etat partie à la convention de 1907 établissant une cour de justice centraméricaine et un pays — les Etats-Unis — qui n'avait pas cette qualité.

L'accord Cuadra-Lizano

38. Monsieur le président, Messieurs les juges, parmi les autres textes permettant de cerner les contours du droit de navigation du Costa Rica sur le fleuve San Juan figure le communiqué conjoint Cuadra-Lizano du 30 juillet 1998. Dans ce texte, le ministre de la défense du Nicaragua et le ministre du gouvernement, de la police et de la sécurité publique du Costa Rica disent leur respect de la souveraineté du Nicaragua sur les eaux du San Juan et aussi leur respect des droits de navigation du Costa Rica sur ce fleuve. Le texte du «communiqué conjoint» permet aux navires publics costa-riciens de circuler sur le fleuve avec leur armement normal pour repourvoir et réapprovisionner les postes frontière du Costa Rica, à condition que les autorités nicaraguayennes en soient informées, qu'elles puissent accompagner ces navires si elles le souhaitent et que leurs mouvements soient communiqués aux postes frontière du Nicaragua.

39. A mon sens, ce texte établit un équilibre tout à fait acceptable entre les intérêts des deux Parties. Pourtant, fidèle à ses habitudes qui consistent, soit à nier le caractère normatif des textes conventionnels perçus comme gênants, soit simplement à en contester la validité, la Partie adverse a, par la suite, déclaré «nul et non avenu» ce texte et a, en même temps, mis en cause sa normativité ; elle a également affirmé que le communiqué «pourrait [notez le conditionnel] entamer la souveraineté nationale».

40. On se demande quelle pourrait bien être la raison pour déclarer nul et non avenu un texte dépourvu de normativité. Pour ce qui est de l'éventuelle atteinte à la souveraineté de la Partie adverse, on observera que : i) cet argument contredit celui de l'absence de normativité ; ii) tout texte conventionnel, dans un sens, entame le *statu quo* des souverainetés ; c'est la raison pour laquelle on conclut des traités[113]. Le Costa Rica, qui respecte scrupuleusement le droit international, s'attend à ce que son voisin en fasse de même et qu'il cesse de s'engager dans la voie

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[113] *Vapeur* Wimbledon, *arrêts, 1923, C.P.J.I. série A n° 1*, p. 25.

unilatérale. C'est la déclaration de nullité du communiqué Cuadra-Lizano qui est nulle plutôt que le communiqué lui-même !

L'application du droit international coutumier

41. Reste, Monsieur le président, Messieurs les juges, la question de l'application du droit international coutumier dans la présente espèce. Le Nicaragua semble éprouver beaucoup de peine à admettre que le San Juan est un cours d'eau *international*, concédant tout au plus[114] que le San Juan «inclut un élément international» ; mais, vu que la rive septentrionale, les eaux et le lit du cours d'eau relèvent du Nicaragua, le San Juan serait «indubitablement un fleuve national du Nicaragua auquel la pleine souveraineté de cet Etat s'étend, la seule limitation à celle-ci étant celle qui résulte du traité de 1858»[115].

42. C'est dans cette même mesure et dans cette mesure seulement que la souveraineté territoriale sur le fleuve «n'est pas absolue mais limitée par les restrictions [je vous rends attentifs au pluriel !] imposées par le traité». On notera, à propos de cette citation[116], qu'elle est tirée du jugement de la Cour de justice centraméricaine de 1916 auquel le Nicaragua, par ailleurs, a dénié toute pertinence. Ainsi la Partie adverse refuse toute application au San Juan de règles du droit international général relatives à la navigation des cours d'eau internationaux ; la seule règle applicable de ce droit serait, en l'espèce, celle de la souveraineté territoriale, limitée par les restrictions résultant du «traité de délimitation des frontières» de 1858, ces restrictions consistant en un droit de libre navigation aux fins du commerce[117]. Ainsi *le principe cardinal* serait celui de la souveraineté territoriale du Nicaragua, *l'exception* celle du droit limité de navigation attribué au Costa Rica par le traité Cañas-Jerez. Et, s'agissant d'une limite *conventionnelle* à cette souveraineté, elle devrait, selon la jurisprudence internationale, être interprétée restrictivement[118]. Finalement, la Partie adverse expose que les règles du droit international général, singulièrement

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[114] Contre-mémoire du Nicaragua (CMN), vol. I, par. 3.3.3.

[115] *Ibid.*

[116] *Ibid.*, par. 3.3.4.

[117] *Ibid.*, par. 3.3.5 et 3.3.6.

[118] *Ibid.*, par. 3.3.9.

celles qualifiées de «secondaires», ne s'appliquent que pour autant qu'elles ne contredisent pas la sentence de 1888[119].

43. Monsieur le président, nul ne conteste que la situation soit régie par le traité Cañas-Jerez et par l'interprétation qui a été donnée à celui-ci en 1888 et qui, doit-on ajouter, a été confirmée par la Cour centraméricaine en 1916. Ce qui est contestable, en revanche, c'est l'idée qu'il y a un *principe cardinal* — la souveraineté — et une *exception* — un droit limité de navigation — qui demande à être interprétée *restrictivement*.

44. S'il est vrai que des juridictions internationales ont parfois préconisé une interprétation restrictive des limitations apportées à la souveraineté territoriale, ce principe ne se rencontre nulle part dans les règles pertinentes — les articles 31 et 32 — de la convention de Vienne sur le droit des traités. Cela pourrait résulter du fait que ce que l'on a appelé interprétation restrictive ne désigne pas en réalité une *règle* d'interprétation, mais le *résultat* auquel peut aboutir l'application des règles d'interprétation des traités, ces dernières faisant partie des règles coutumières permettant notamment de déterminer le sens et la portée du régime conventionnel de 1858.

45. Qui plus est, l'interprétation restrictive proposée par le Nicaragua n'est simplement pas pertinente dans la présente espèce, car, comme la Cour permanente de Justice internationale l'a dit dans l'affaire du *Vapeur* Wimbledon, on «ne saurait, sous couleur d'interprétation restrictive, aller jusqu'à refuser à [un traité] le sens qui est commandé par ses termes formels» (*Vapeur* Wimbledon, *arrêts, 1923, C.P.J.I. série A n° 1*, p. 24-25), ce qui est précisément le cas ici : dans le traité Cañas-Jerez la souveraineté est clairement limitée par le droit perpétuel de libre navigation du Costa Rica aux fins du commerce. De même, dans son arrêt en l'affaire de la *Juridiction territoriale de la Commission internationale de l'Oder*, la Cour permanente expose que «ce sera seulement si, tout élément ayant été pris en considération, l'intention des Parties n'en reste pas moins douteuse, qu'il y aura lieu de se prononcer pour l'interprétation la plus favorable à la liberté des Etats»[120]. En l'espèce, Monsieur le président, cette intention n'est pas douteuse.

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[119] *Ibid.*, par. 3.3.10.

[120] *Juridiction territoriale de la Commission internationale de l'Oder, arrêt n° 16, 1929, C.P.J.I. série A n° 23*, p. 26.

46. En conclusion, sur ce point, on peut affirmer que soit l'interprétation restrictive n'est pas une règle d'interprétation des traités du tout, soit qu'elle est une règle subsidiaire d'interprétation qui n'intervient que lorsque l'intention des Parties reste douteuse après l'utilisation des moyens d'interprétation principaux décrits à l'article 31 de la convention de Vienne sur le droit des traités. Or nul doute n'existe dans le cas présent. On est en présence d'un droit perpétuel de libre navigation qui est placé sur un pied d'égalité avec la souveraineté sur le fleuve que le traité de 1858 attribue au Nicaragua, et nullement d'une entorse minime à cette souveraineté. Qu'il en est bien ainsi est démontré, d'abord, par les fréquentes références du texte à la partie du fleuve «où la navigation est commune» aux deux pays. C'est ce que suggère aussi le fait qu'on est en présence d'un régime conventionnel où il est également question d'accostage sur l'autre rive, de navigation intérieure, de navigation d'embarcations publiques, de défense commune du fleuve et de la procédure à suivre lorsque l'un des deux riverains, le Nicaragua, souhaite accorder le droit de construire un canal interocéanique à un Etat tiers. Cette hiérarchisation souveraineté territoriale/exception semble inappropriée dans le contexte présent, où un régime fluvial international d'une certaine complexité a été mis en place.

47. On ajoutera que les règles du droit coutumier peuvent également venir compléter les règles d'un droit conventionnel de navigation dont les contours ne sont pas circonscrits avec toute la précision voulue. Ainsi, dans la mesure où les dispositions conventionnelles ne répondent pas aux questions qui se posent, on peut recourir, pour en dégager le sens et la portée, aux règles du droit international général en matière de navigation, conformément à l'article 31, par 3 *c*), de la convention de Vienne sur le droit des traités.

48. Pour terminer sur ce point, on relèvera que les définitions données par le droit international général de notions telles que «droit de navigation» sont bien évidemment pertinentes lorsqu'il s'agit d'interpréter les mêmes notions figurant dans un texte conventionnel.

Conclusions

49. Monsieur le président, Messieurs les juges, les explications qui ont précédé permettent, à mon sens, de formuler les conclusions suivantes :

1) Le traité Cañas-Jerez établit un véritable régime juridique comprenant : des règles relatives à la souveraineté sur le fleuve San Juan ; un droit perpétuel de libre navigation et de transit au profit du Costa Rica ; un droit pour les navires de chaque riverain d'accoster sur la rive de l'autre ; la création de *condominia* aux points terminaux de la frontière ; des règles sur la défense commune du fleuve ; et le devoir pour le Nicaragua de consulter son voisin au cas où il projetterait des travaux de canalisation.
2) Le droit perpétuel de libre navigation fait partie intégrante de ce régime conventionnel et n'est en aucune manière subordonné à la souveraineté du Nicaragua de façon à permettre à celui-ci de le limiter ou de le supprimer.
3) Le régime en question a été confirmé et précisé par la sentence du président Cleveland qui autorise la navigation d'embarcations rattachées au service fiscal du Costa Rica sur le fleuve San Juan dans la mesure indiquée par elle. Ce régime a également été confirmé par le jugement rendu par la Cour de justice centraméricaine en 1916, pertinent dans le contexte de la présente affaire.
4) Le «communiqué conjoint» Cuadra-Lizano du 30 juillet 1998 est un accord valablement conclu. La déclaration du Nicaragua le qualifiant de «nul et non valable» ne peut être retenue.
5) Les règles du droit international coutumier s'appliquent à l'interprétation du traité de 1858 et peuvent servir à compléter les règles conventionnelles en matière de navigation fluviale. En outre, les définitions générales données de la liberté de navigation par le droit coutumier peuvent venir préciser le sens et la portée de cette notion dans le cadre du traité de 1858.

Merci, Monsieur le président, Messieurs les juges, pour votre patiente et bienveillante attention. Je vous prie de bien vouloir, maintenant, donner la parole à mon collège et ami, le professeur Kohen.

The PRESIDENT: I thank Professor Lucius Caflisch for his presentation. I now give the floor to Professor Marcelo Kohen. Before Marcelo Kohen speaks, I would like to offer to Professor Marcelo Kohen that if you feel that you cannot finish your presentation within a reasonable time this morning, you may break your presentation into two parts and leave the second half to tomorrow morning's session. It is your choice, but I leave it to you. Thank you.

M. KOHEN: Thank you very much, Mr. President.

LA PORTÉE DU DROIT DE NAVIGATION AUX FINS DU COMMERCE

1. Monsieur le président, Messieurs les juges, c'est un grand honneur de comparaître devant votre haute juridiction pour défendre les droits du Costa Rica.

2. Il m'incombe de vous exposer la portée du droit perpétuel de libre navigation *aux fins du commerce*, telle qu'elle découle de l'article VI du traité Cañas-Jerez[121].

3. Le Nicaragua prétend justifier son comportement ouvertement contraire à cet article en avançant une interprétation erronée de celui-ci. Je ne crois pas exagérer si je décris la tactique nicaraguayenne comme le recours à une astuce — à savoir jouer avec les mots de l'article VI — pour nier aujourd'hui ce qui a été une interprétation commune des parties, partagée par des autorités juridictionnelles et autres durant plus d'un siècle.

4. Le Nicaragua a avancé pour la première fois en 1994, et ceci de manière constante depuis mars 2000, que l'expression «con objetos de comercio» (aux fins du commerce) contenue dans cet article se réfère à la navigation «avec des articles de commerce»[122].

5. Dans cet exposé, je vais suivre les critères d'interprétation établis par la convention de Vienne sur le droit des traités, reflet du droit coutumier[123]. Tout démontre que l'expression en

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[121] «La République du Nicaragua aura le *dominium* et l'*imperium* exclusifs sur les eaux du fleuve San Juan depuis son origine dans le Lac, jusqu'à son embouchure dans l'Océan Atlantique ; la République du Costa Rica aura toutefois un droit perpétuel de libre navigation sur lesdites eaux, entre l'embouchure du fleuve et le point situé à trois milles anglaises de Castillo Viejo, aux fins du commerce, avec le Nicaragua aussi bien que du commerce avec l'intérieur du Costa Rica par la rivière San Carlos, la rivière Sarapiqui ou toute autre voie de navigation partant de la portion de la rive du fleuve San Juan déclarée par le présent traité appartenir au Costa Rica». (MCR, vol. 2, annexe 7.)

Version originale en espagnol :

«La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua, o al interior de Costa Rica, por los ríos de San Carlos o Sarapiquí, o cualquier otra vía procedente de la parte que en la ribera del San Juan se establece corresponder a esta República.»

Traduction anglaise :

«The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiqui, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica.» [Traduction soumise au président Cleveland par le Costa Rica. *Ibid. b)*.]

[122] MCR, par. 4.20.

cause se réfère «aux fins du commerce» : le sens ordinaire du texte de l'article VI, son contexte, l'objet et le but du traité, l'interprétation donnée par les parties, par les arbitres et par les juges qui ont déjà traité de la question, ainsi que la pratique subséquente. Nous verrons également que l'étendue des fins du commerce du droit costa-ricien de libre navigation comprend aussi bien le transport de personnes que celui de marchandises.

A. Le sens ordinaire des termes employés par l'article VI du traité Cañas-Jerez

6. Le Nicaragua a changé de tactique au cours de la phase écrite. Dans son contre-mémoire, son effort s'est concentré sur sa volonté de démontrer que «objetos» voulait dire «articles»[124]. Dans sa duplique, le Nicaragua aurait découvert que le terme essentiel serait «comercio»[125]. Cela constitue peut-être le premier aveu de la faiblesse intrinsèque de son interprétation du terme «objetos». Maintenant, selon le Nicaragua, même «aux fins du commerce» signifierait uniquement une navigation «avec des articles de commerce»[126].

7. Le fait est qu'il n'y a pas eu la moindre tentative de la part du Nicaragua pour réfuter la portée que le Costa Rica a attribuée au terme «comercio» dès le début de la phase écrite[127]. Le défendeur s'est en effet contenté de répéter que le commerce est l'achat et la vente de marchandises[128].

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[123] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21, par. 41 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 18, par. 33 ; *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 812, par. 23 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1059, par. 18 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 501, par. 99 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 645, par. 37 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004*, p. 48, par. 83 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, ordonnance du 30 janvier 2004, C.I.J. Recueil 2004*, p. 174, par. 94 ; *Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique), exceptions préliminaires, arrêt, C.I.J. Recueil 2004*, p. 318, par. 100 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt du 26 février 2007 (fond)*, par. 160 ; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt du 4 juin 2008*, par. 153.

[124] CMN, par. 4.1.16-4.1.36.

[125] DN, vol. I, par. 1.9-1.10.

[126] DN, vol. I, par. 1.10, 3.13, 3.15.

[127] MCR, par. 4.42-4.51.

[128] CMN, par. 4.3.19 ; DN, par. 3.70.

a) Le terme «objetos» est employé à l'article VI dans le sens de «fins» (purposes en anglais)

8. Selon le Nicaragua, la phrase «con objetos de comercio» peut signifier uniquement commerce avec des articles, des biens ou des marchandises. Cette expression ne veut jamais dire «aux fins de»[129]. La raison invoquée repose en dernier ressort sur l'allégation selon laquelle objetos, au pluriel, ne peut signifier que «choses» ; seul le singulier *objeto* peut signifier «fin» (purpose, en anglais)[130]. Je reviendrai sur cette question dans un instant.

i) Tous, y compris le Nicaragua, ont traduit «con objetos de comercio» de la même manière : «aux fins du commerce»

9. Le Nicaragua affirme que la traduction littérale de «con objetos de comercio» en anglais serait «with objects of commerce». Il ajoute néanmoins que cela ne constitue pas une tournure heureuse[131]. S'il en est ainsi, cela fournit une explication supplémentaire au pourquoi de la traduction adoptée par les deux parties, — oui : par les deux parties — [132], par le président Cleveland[133], par George Rives (à qui ce dernier avait confié la tâche d'étudier les pièces des parties et d'élaborer un rapport)[134], par les British and Foreign State Papers (pour le traité Cañas-Jerez)[135] et par le département d'Etat des Etats-Unis d'Amérique, suivi de l'*American Journal of International Law* (pour l'arrêt de la Cour centraméricaine de justice de 1916)[136]. Tous, en effet, de manière uniforme, ont traduit la phrase «con objetos de comercio» par «for the purposes of commerce», «for purposes of commerce» ou «for commercial purposes», ou se sont référés, comme la sentence Cleveland, à la jouissance par le Costa Rica «of the «purposes of commerce»».

10. «Objects of commerce» ne serait pas la traduction la plus «heureuse», en effet. Il fallait donc trouver la meilleure expression pour rendre «con objetos de comercio» en anglais. Et

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[129] DN, vol. I, par. 3.12 : «The phrase «*con objetos de comercio*» therefore can only mean trade (or commerce) with articles, goods, or commodities; it can never mean «for purposes»»

[130] Cf. CMN, par. 4.1.27, DN, par. 3.12.

[131] CMN, par. 4.1.28.

[132] Réplique du Costa Rica (RCR), par. 3.41-3.42. Pour la version en anglais de l'article VI présentée par le Nicaragua au président Cleveland en 1887, voir MCR, vol. 2, annexe 7 *c)*. Pour la version en anglais de la même disposition présentée par le Costa Rica, voir MCR, annexes, vol. 2, annexe 7 *b)*.

[133] MCR, vol. 2, annexe 16.

[134] CMN, vol. II, annexe 70.

[135] MCR, vol. 2, annexe 7 *d)*.

[136] MCR, vol. 2, annexe 21 (dossier des plaidoiries, onglet n° 17).

l'expression choisie fut «for the purposes of commerce» ou l'une des variantes que je viens de mentionner.

11. Peut-être que nos amis nicaraguayens nous diront-ils jeudi que tout le monde s'est trompé, y compris le Nicaragua lui-même. Que tout le monde savait pertinemment que «con objetos de comercio» voulait dire «with articles of trade» mais, pour je ne sais quelle raison, ils l'ont tous traduit par «for the purposes of commerce». Peut-être ajouteront-ils que le Nicaragua lui-même s'est trompé pendant des années, même en espagnol, lorsque ses publications officielles expliquant la portée du traité Cañas-Jerez et signées par le ministre des affaires étrangères en personne, affirmaient que le droit de navigation du Costa Rica est «con fines de comercio», c'est-à-dire «aux fins du commerce», ou en anglais «for purposes of commerce»[137], au lieu de dire «con artículos de comercio» ou «con mercaderías».

ii) Le rapport de M. Seco souffre de graves déficiences

12. A sa dernière pièce écrite, le Nicaragua a annexé le rapport d'un linguiste espagnol, M. Seco, qui répète ce que le défendeur a avancé dans son contre-mémoire[138]. La première réaction à la lecture de ce rapport est que sa conclusion n'est pas vraiment étayée par ses analyses. Par ailleurs, le Nicaragua n'a pas cru opportun de produire la traduction des annexes du rapport Seco, lesquelles — même en espagnol — ne figurent pas à l'annexe 64 de la duplique. On les trouve uniquement dans le volume des documents complets remis par le Nicaragua au Greffe.

13. Les annexes 3, 4 et 6 du rapport Seco ne peuvent pas tromper. Elles offrent des hypothèses d'utilisation du terme «objetos» qui vont dans le sens de l'interprétation de l'article VI comme signifiant «aux fins du [commerce]» ou «par rapport au [commerce]» ou «en matière [de commerce]». Ils dépassent — et de loin — les exemples trouvés par M. Seco de l'emploi d'«objetos» comme «articles [de commerce]»[139].

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[137] *Situacion juridica del Rio San Juan*, 1954, Ministerio de Relaciones Exteriores, Managua, 1954, MCR, vol. 6, annexe 219 ; *Situacion juridica del Rio San Juan*, 1974, Ministerio de Relaciones Exteriores, Managua, 1974, MCR, vol. 6, annexe 222, dossiers des plaidoiries, onglet n° 18.

[138] Rapport de M. Manuel Seco Reymundo, DN, annexe 64 .

[139] DN, *Original Deposited with the Registry*, annexes, vol. II, annexe 64, annexes 3, 4 et 6 (seulement en espagnol).

14. Le rapport Seco néglige totalement l'emploi fréquent fait par les Parties du terme «objetos» comme signifiant «fins» ou «matières» (et non «articles» ou «choses»), tel qu'il découle des tableaux présentés dans la réplique costa-ricienne[140]. Il n'examine pas le lien entre l'expression en cause et les mots qui la suivent immédiatement.

iii) **Le rapport de M. Moreno de Alba rétablit la vérité du point de vue linguistique**

15. Le Costa Rica a présenté un rapport alternatif, dont l'auteur est un linguiste hispano-américain de renom, directeur de l'Académie mexicaine de la langue, M. Moreno de Alba. Son analyse sérieuse et complète ne laisse planer aucun doute quant à la signification de l'expression «con objetos de comercio». Il montre que du point de vue de la lexicologie générale, historique, sémantique et syntaxique, ainsi que pour des raisons textuelles et contextuelles, la seule signification possible des termes «con objetos de comercio» à l'article VI est «aux fins du commerce».

iv) **Le Nicaragua a largement employé le pluriel «objetos» pour signifier «fins»**

16. Le Costa Rica a cité de nombreuses utilisations par le Nicaragua du terme «objetos» (au pluriel) dans des situations qui, sans équivoque, signifient «finalités»[141]. Jusqu'à présent, le Nicaragua est resté silencieux. M. Seco semble les avoir ignorées aussi. La réplique a donné des exemples montrant comment le contre-mémoire nicaraguayen a déformé des traductions et des citations, dans le but d'éviter de rendre au terme «objetos» son sens de «fins»[142]. La duplique ne les a pas démentis.

17. En fait, nous pourrions élargir la liste des utilisations officielles faites par le Nicaragua du pluriel «objetos» dans le sens de «fins». Le code civil de la République sœur abonde en exemples de ce genre. Je mentionnerai simplement les articles 89, 91, 805 et 1319, que vous trouverez à l'onglet n° 19 de vos dossiers[143].

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[140] RCR, p. 99-126.

[141] RCR, par. 3.55-3.59 et tableau 1, p. 99-126.

[142] Cf. RCR, par. 3.63-3.64.

[143] Texte in : http ://www.biblioteca.jus.gov.ar/CodigoNicaragua.PDF. Visité le 1er mars 2009.

v) L'emploi du terme «objetos» à l'article VIII du traité Cañas-Jerez

18. On relèvera enfin que la version anglaise du traité soumise par le Nicaragua à l'arbitre Cleveland a traduit «objetos» à l'article VI par le terme «purposes» et a retranscrit le même mot «objetos» à l'article VIII par «objects»[144]. Il est alors possible de se demander pourquoi le Nicaragua a utilisé «objects» à l'article VIII, pour se référer aux fins ou matières des contrats visés par cet article, et n'a pas employé «objects» quand il a traduit «objetos de comercio» à l'article VI, si ce dernier concernait des «articles of trade». La raison est simple : à l'époque, pour le Nicaragua, l'emploi du terme «objetos» dans le traité signifiait «fins» ou «matières», et personne à Managua n'attribuait à l'expression de l'article VI une autre signification que «purposes of commerce». L'invention des «articles of trade» est venue un siècle et demi plus tard, pour justifier les restrictions imposées à la libre navigation costa-ricienne.

19. Il ne fait donc pas de doute que le sens ordinaire du terme «objetos» employé à l'article VI du traité de 1858 est «fins» «purposes» en anglais ; et non «articles».

b) Le terme «comercio» est employé dans un sens plus large que celui d'achat et de vente de marchandises

20. Passons maintenant au terme «comercio». Dans son mémoire, le Costa Rica a expliqué que ce terme, précédé de «objetos» au pluriel, exprime le fait que l'article VI vise plus qu'un seul objet commercial pour la navigation[145]. Cela suffirait déjà pour rejeter la thèse nicaraguayenne selon laquelle le seul objet de la navigation costa-ricienne reconnu par le traité serait celui du transport de marchandises.

i) Le sens ordinaire du terme «comercio» comprend aussi bien les activités marchandes que la communication

21. Le mémoire a également établi que le sens ordinaire du terme «commerce» inclut aussi bien la communication que le transport de marchandises et de personnes[146]. C'est le dictionnaire de l'Académie royale de la langue espagnole qui donne exactement ces définitions, et ceci dans toutes les éditions que les deux Parties ont présentées devant cette instance. Il est vrai que le Nicaragua a,

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[144] MCR, vol. 2, annexe 7 *c)* (dossier des plaidoiries, onglet n° 20).

[145] MCR, par. 4.42.

[146] MCR, par. 4.52-4.72.

disons, «oublié» de citer la seconde acception mentionnée par le dictionnaire, que je cite : «Comunicación y trato de unas gentes o pueblos con otros» («communication et fréquentation de certains gens ou peuples avec d'autres»)[147].

22. Le rapport de M. Moreno de Alba fournit l'explication de l'emploi du terme «commerce» comme communication entre personnes. De plus, il établit une relation entre commerce et son synonyme «trafic»[148].

ii) L'analyse impeccable du Nicaragua ... dans son affaire contre les Etats-Unis d'Amérique

23. Je dois reconnaître, Monsieur le président, que le Nicaragua a déjà présenté une analyse impeccable du terme «commerce» devant votre Cour. Pas dans cette affaire malheureusement, mais dans celle l'opposant aux Etats-Unis d'Amérique. Vous la trouverez dans votre dossier à l'onglet n° 22. Là, le Nicaragua nous enseigne que le terme «commerce» en anglais est plus large que «trade» et que l'activité commerciale ne concerne pas seulement l'achat et la vente de marchandises, mais aussi l'industrie et tout particulièrement — tout particulièrement, Monsieur le président — les affaires de transport. Le Nicaragua cite ensuite la définition bien connue de la liberté de navigation donnée par votre devancière dans l'affaire *Oscar Chinn* — qui inclut aussi bien le transport de biens que celui de passagers[149] — pour conclure que cette définition est conforme aux règles coutumières et conventionnelles en vigueur[150].

24. Durant toute la procédure écrite, le Nicaragua n'a pas expliqué son revirement dans l'interprétation du terme «commerce», même si nous avons souligné dans notre mémoire sa position dans l'affaire des *Activités militaires et paramilitaires*[151].

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[147] La Academia Española, *Diccionario de la lengua castellana por la Academia Española*, (10 éd., Madir : Imprenta Nacional, 1852, p. 170 ; annexe III présentée par le Costa Rica le 27 novembre 2008 (dossier des plaidoiries, onglet n° 21).

[148] José G. Moreno de Alba, Dictamen sobre el significado del sintagma *con objetos de comercio* en el contexto del articulo 6° del *Tratado de límites entre Costa Rica y Nicaragua* (14 de abril de 1858), annexe I présentée par le Costa Rica le 27 novembre 2008, partie VII.

[149] *Oscar Chinn, arrêt, 1934, C.P.J.I, série A/B n° 63*, p. 83.

[150] *C.I.J Mémoires, Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, vol. I, p. 403-4.

[151] MCR, par. 4.46.

iii) Un document tardif nicaraguayen

25. Par contre, la duplique nicaraguayenne reproduit une lettre émanant d'un ancien directeur des services linguistiques et de la documentation de l'OMC, qui se réfère quant à lui à l'utilisation des expressions «objetos de comercio» et «articles of trade»[152]. Cette lettre est datée du *12 octobre 2006* et répond à une lettre de l'ambassadeur du Nicaragua auprès de l'OMC. Pourquoi le Nicaragua ne l'a-t-il pas annexé à son contre-mémoire, déposé le *29 mai 2007* ? Il l'a annexé à sa duplique, empêchant ainsi le Costa Rica de réagir durant la procédure écrite. De plus, le Nicaragua n'a pas présenté la lettre de son ambassadeur : on ignore ce que celle-ci a demandé et quelles informations elle a transmises. La valeur probante de la réponse est ainsi largement compromise.

26. Quoi qu'il en soit, ce texte n'est pas d'une grande valeur pour les thèses du Nicaragua. Je dirais même que c'est plutôt le contraire. L'ancien fonctionnaire de l'OMC affirme qu'il n'a pas trouvé de textes où l'expression espagnole «objetos de comercio» ait été traduite en anglais. Il donne deux exemples où les termes anglais «objects of trade» ou «wares» ont été traduits comme «objetos de comercio», mais notons qu'en la présente affaire il n'est pas question d'interpréter la traduction en espagnol d'un texte anglais.

27. Par contre, le fonctionnaire de l'OMC affirme qu'«au XIXe siècle, les expressions anglaises «objects of trade» et «articles of trade» ont été employées pour décrire des biens ou articles qui faisaient l'objet de commerce»[153]. S'il en a vraiment été ainsi, cela confirme que lorsque les deux parties, Rives, Cleveland et les *British and Foreign State Papers* ont traduit «con objetos de comercio» par «for the purposes of commerce», ils l'ont fait ayant le choix entre cette formule et celle d'«articles of trade». Et ils ont choisi «purposes of commerce» et non «articles of trade».

iv) Le commerce inclut le transport de passagers

28. Selon le Nicaragua,

> «[t]he most lucrative business at the time of the signing of the Treaty of 1858 was by far the transport of passengers. Thus this transport of passengers as a commercial

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[152] DN, annexe 63.

[153] Original en Anglais : «Furthermore, in the 19th century, the English expressions «objects of trade» and «articles of trade» were used to describe goods or articles that were object of trade». *(Ibid.)*

> activity was, needless to say, carefully excluded from the right of navigation with articles of trade recognized by Article VI of the Jerez-Cañas Treaty»[154].

J'aurais pu croire le Nicaragua s'il avait été stipulé à cet article que le Costa Rica avait le droit de libre navigation à l'exclusion du transport de passagers, mais cette «soigneuse exclusion» est absente.

29. Selon le Nicaragua, il serait impensable qu'il ait pu y avoir de sa part une volonté de partager avec le Costa Rica la plus importante activité lucrative sur le fleuve[155]. Il donne comme exemple des contrats qu'il a conclus avec des sociétés des Etats-Unis d'Amérique. Le Nicaragua se trompe de cible. Ces contrats visaient le transport interocéanique avec des navires à vapeur. Le Costa Rica n'a jamais prétendu que son droit de navigation comprenait une activité d'une telle ampleur. Clairement, son droit de navigation — avec des personnes et des marchandises — était circonscrit à l'étendue géographique décrite à l'article VI et n'allait pas au-delà du point situé à 3 milles de Castillo Viejo.

30. Le transport de passagers constitue une activité commerciale, aussi bien au XIX^e^ siècle qu'aujourd'hui[156]. On vient de voir que le Nicaragua lui-même le reconnaît. J'ajouterai à l'appui l'accord ministériel n° 48 de 1992 du Nicaragua concernant l'impôt sur la circulation et la navigation. La description qui y est faite des «navires commerciaux internes» est celle des navires qui s'occupent — je cite — : «de cargo, de passagers et de pêche»[157]. Apparemment, pour nos amis nicaraguayens leurs navires s'adonnant au transport de marchandises et de passagers ou à la pêche peuvent tous être qualifiés de navires commerciaux. En revanche, les navires costa-riciens auraient droit à cette qualification uniquement s'ils transportent des marchandises.

31. Transport et communication sont intimement liés. La manière dont l'article VI est rédigé renforce l'idée que l'une des «fins du commerce» est la communication. La liberté de navigation inclut la possibilité de faire communiquer un point au Costa Rica avec un point au Nicaragua ou au Costa Rica. Il n'existe aucune raison de limiter cette liberté de navigation aux seuls navires

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[154] CMN, par. 4.1.37 ; DN, par. 3.91.

[155] CMN par. 4.1.37, DN, par. 3.91.

[156] MCR, par. 4.58-4.72; RCR, par. 3.76-3.78.

[157] Acuerdo Ministerial n° 48 aprobado el 30 de julio de 1992. Disponible in : http ://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/3730F8C8DE70CE71062570A100583FCE?OpenDocument (visité le 1^er^ mars 2009) (dossier de plaidoiries, onglet n° 23).

transportant des marchandises. Le traité ne le fait pas. Au contraire, il consacre ce droit comme un droit appartenant directement à l'Etat et non pas à ses seuls citoyens. La liberté de navigation s'étend à des navires aussi bien publics que privés, ce qui vient corroborer l'idée que le droit de libre navigation ne se réduit pas au commerce de marchandises, tâche généralement réservée aux particuliers.

32. En conséquence, que les fins du commerce soient une activité marchande ou de communication, la navigation inclut le transport de marchandises *et de personnes*.

v) Le transport de touristes est une activité commerciale

33. Par ailleurs, le transport des touristes d'un point du territoire du Costa Rica à un autre par des navires costa-riciens est couvert par toutes les définitions possibles de l'expression «aux fins du commerce»[158]. Cela a été explicitement reconnu par l'ancien ministre nicaraguayen du tourisme, Pedro Joaquín Chamorro, qui a déclaré qu'il n'était pas opposé à l'utilisation du San Juan à des fins du tourisme car cette activité fait partie actuellement du commerce[159].

34. Dans l'affaire *Kasikili/Sedudu*, votre Cour a rappelé que le Botswana et la Namibie avaient interprété la notion de liberté de navigation comme incluant la navigation touristique[160]. Cela s'est appliqué au chenal sud du fleuve Chobe, alors que les eaux *et les deux rives de ce chenal* sont entièrement botswanaises[161]. Les efforts du Nicaragua pour entretenir la confusion relativement aux implications de cet arrêt pour la présente affaire sont voués à l'échec[162]. Nous mentionnons ce précédent pour signaler que même là où la Namibie n'est pas riveraine du Chobe, elle bénéficie de la liberté de navigation et que cette liberté est interprétée comme comprenant la navigation touristique. Et ceci, alors que la frontière passe par le *thalweg* du chenal nord, qui est le chenal principal du fleuve, et qu'il n'existe donc aucun besoin d'utiliser le chenal sud pour naviguer d'un point à un autre du territoire namibien.

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[158] MCR par. 4.58-4.72 ; RCR par. 3.76-3.78.

[159] MCR, par. 4.69 et vol. 5, annexes 138 et 139 (dossier de plaidoiries, onglet n° 24).

[160] Graphique : dossier de plaidoiries, onglet n° 25.

[161] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1049, 1071 et 1072 ; par. 40, 102 et 103 ; déclarations des juges Ranjeva (*ibid.*, p. 1110) et Koroma (*ibid.*, p. 1112) ; MCR, par. 4.68, RCR, par. 2.71 ; dossier de plaidoiries, onglet n° 25.

[162] DN, par. 2.30-2.32.

35. La situation des bateaux touristiques namibiens sur le chenal sud du Chobe peut être comparée à la situation du San Juan, hormis les différences suivantes : le Costa Rica *est riverain* du tronçon du San Juan où il bénéficie de la libre navigation ; il n'existe pas d'autre voie pour naviguer entre les points du territoire costa-ricien connectés par ces moyens de transport, et finalement, le but de cette navigation est de relier deux points du territoire costa-ricien.

vi) «Con objetos de comercio» est l'équivalent espagnol de «sous le rapport du commerce»

36. Je passe maintenant à l'analyse d'une expression française qui a été utilisée au XIX^e^ siècle pour qualifier la liberté de navigation. Il s'agit de l'expression «sous le rapport du commerce», employée à partir du congrès de Vienne. «Con objetos de comercio» est un équivalent espagnol. L'expression fut utilisée par le traité sur la navigation du Danube de 1857, une année avant le traité Cañas-Jerez. Elle fut explicitement interprétée par le Gouvernement britannique comme signifiant «tant pour le transport des marchandises que pour celui des voyageurs»[163].

37. Comme l'affirme le Nicaragua, «les textes contemporains relatifs aux régulations des fleuves européens devaient être parfaitement connus des Parties en 1858»[164]. L'agent du Nicaragua a traduit en espagnol «sous le rapport du commerce» comme signifiant «para fines comerciales»[165], ce qui signifie précisément «con objetos de comercio». Ce n'est pas moi qui le dit, mais la Cour de justice centraméricaine[166] et les documents du ministère nicaraguayen des affaires étrangères de 1954 et 1974 qui utilisent aussi l'expression «con fines comerciales» ou «con fines de comercio» pour se référer au droit de navigation du Costa Rica[167] !

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[163] Engelhardt (éd.), *Du régime conventionnel des fleuves* internationaux. *Etudes et projet de règlement général précédés d'une introduction historique* (Paris : Cotillon, 1879), p. 85-86.

[164] CMN, par. 4.1.29 : «the text of the almost coetaneous regulations of the European Rivers must have been perfectly known by the Parties in 1858».

[165] Carlos J. Argüello Gomez, *Algunos aspectos jurídicos sobre el Tratado Jerez-Cañas y el Laudo Cleveland*, ministère des affaires étrangères, Managua, 26 août 1998. Disponible sur : http://www.joseacontreras.net/dirinter/america/Nicaragua_Rio_San_Juan.pdf (visité le 1^er^ mars 2009). Jusqu'au 27 février 2009 aussi in : http://www.euram.com.ni/pverdes/articulos/aspectos_juridicos_rio_san_juan.htm. Dossier de plaidoiries, onglet n° 27.

[166] MCR, annexe 21, chap. III, *a)*. Texte original en espagnol : MCR, vol. I, p. 23, note 53 (dossier de plaidoiries, onglet n° 3).

[167] Nicaragua, ministère des affaires étrangères, *Situación jurídica del Rio San Juan*, Managua 1954, MCR, vol. 6, annexe 219 ; Nicaragua, ministère des affaires étrangères, *Situación jurídica del Rio San Juan*, Managua, 1974, MCR, vol. 6, annexe 222. Dossier de plaidoiries, onglet n° 18.

38. Pour résumer ce point, Monsieur le président, le terme «comercio» désigne les acceptions principales que le dictionnaire lui attribue : l'idée de transaction et de tout ce qui lui est connexe, ainsi que celle de communication[168].

39. Au bout du compte, l'interprétation que nos contradicteurs vous présentent n'est guère sérieuse. Le Nicaragua vous propose de traduire «objetos» par «articles» et «comercio» par «trade in goods»[169]. Résultat étonnant : la traduction serait donc : «with articles of trade in goods»[170], «avec des articles de commerce de marchandises» ! Je passe maintenant au contexte.

B. Les termes «con objetos de comercio» dans le contexte du traité peuvent seulement signifier «aux fins du commerce»

40. Le contexte qui entoure l'expression «con objetos de comercio» à l'article VI prouve que le sens ordinaire de ces termes est ici «aux fins du commerce». Nous allons mentionner quatre éléments fondamentaux constituant le contexte.

a) Le contexte grammatical montre que les termes «con objetos de comercio» ne pourraient avoir une autre signification

41. A l'article VI, l'expression «con objetos de comercio» explicite le droit perpétuel de libre navigation. Elle n'est pas employée comme une limitation. Elle apparaît juste avant la description de l'étendue géographique relative à l'exercice de ce droit, *premier élément fondamental du contexte*. Ce qui suit immédiatement l'expression en cause exprime la destination de ce commerce. M. Moreno de Alba a fourni, quant à lui, une explication grammaticale irréfutable, démontrant que dans le contexte de la longue phrase de l'article VI, «con objetos de comercio» ne peut pas signifier «avec des articles de commerce» et qu'en réalité, la seule acception possible du point de vue du contexte grammatical est «aux fins du commerce».

b) La référence à la «navigation commune» à l'article VI du traité reflète une étendue large du droit de libre navigation du Costa Rica

42. Un *deuxième élément fondamental du contexte* se trouve quelques lignes plus loin. Pour se référer à la zone géographique où les navires de l'un ou l'autre Etat pourront accoster,

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[168] MCR, par. 4.42-4.72.

[169] CMN, par. 4.1.16-4.1.28 et par. 4.3.19 ; DN, par. 3.4, 3.70.

[170] DN, par. 3.4.

l'article VI utilise l'expression «en la parte en que la navegación es común», «la portion du fleuve où la navigation est commune»[171]. Comment le Nicaragua peut-il expliquer l'adjectif «commune» qui qualifie la navigation des deux Etats sur ce tronçon, s'il est vrai que l'un d'entre eux aurait un droit absolu de navigation et l'autre un droit extrêmement limité ? L'adjectif «commun» n'est pas une terminologie que les Parties utiliseraient si l'interprétation actuelle du Nicaragua était correcte. Le Costa Rica s'est référé à cet élément du contexte dans ses écritures, sans rencontrer jusqu'à présent de réaction du Nicaragua[172].

c) Le mot «objetos» utilisé à l'article VIII du traité renvoie à des «fins» ou «matières», mais non à des «articles»

43. Le *troisième élément fondamental du contexte* est l'article VIII du traité. Pour la deuxième fois, le traité emploie le pluriel «objetos». Il n'y a là aucune marge d'interprétation possible : le terme employé à l'article VIII se réfère aux «fins», «matières» ou «sujets», et évidemment pas à des «articles» ou à des «biens». Nous l'avons affirmé dans le mémoire[173]. Le Nicaragua est resté silencieux. Le rapport de M. Seco ne souffle mot non plus.

d) L'économie d'ensemble du traité confirme l'interprétation costa-ricienne

44. Enfin, un *quatrième élément du contexte* réside dans d'autres droits et obligations du Costa Rica découlant du traité et continue aux articles IV, VIII et IX de celui-ci. Ce contexte est éloquent : il montre que, bien que les eaux du San Juan aient été attribuées au Nicaragua, le Costa Rica y possède d'importants droits et même des obligations. Il serait étonnant de supposer que le Costa Rica doive défendre le fleuve, que le Nicaragua ne puisse conclure librement de contrats de transit sans le préavis du Costa Rica, que les Parties doivent s'abstenir d'utiliser le fleuve pour des opérations militaires en cas de conflit armé, tout cela alors que tout ce que le Costa Rica aurait obtenu de concret aurait été de transporter des marchandises et seulement des marchandises.

45. Ces quatre éléments montrent que le sens ordinaire des termes «con objetos de comercio» dans leur contexte ne peut être autre que «aux fins du commerce».

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[171] «at the portion [of the river] where the navigation is common».

[172] RCR, par. 3.72

[173] MCR, par. 4.27-4.29.

C. Les autres éléments à prendre en considération en même temps que le contexte confirment l'interprétation costa-ricienne

46. Les trois autres facteurs dont on doit tenir compte en même temps que du contexte selon l'article 31 de la convention de Vienne vont également dans le sens de l'interprétation costa-ricienne.

a) Il y a eu un accord ultérieur au sujet de l'interprétation de «con objetos de comercio»

47. L'arbitrage Cleveland a été la première occasion permettant aux parties de manifester leur accord sur le sens de l'expression «con objetos de comercio». Selon le compromis arbitral, les parties pouvaient soulever à l'égard du traité toute question considérée comme relevant «d'une interprétation douteuse». Le Nicaragua a soulevé onze points d'interprétation douteuse, y compris certains points relatifs à l'article VI. Il n'a pas soulevé de question au sujet de l'expression «con objetos de comercio». Le Costa Rica non plus. Ceci témoigne de l'absence de désaccord sur cette question.

48. Mais il y a plus. Les deux parties se sont présentées devant le président-arbitre avec la même traduction : «for the purposes of commerce»[174]. Elles ont ainsi manifesté leur accord sur ce point, certes chacune de son côté, mais de manière identique[175] et devant l'arbitre qu'elles avaient choisi pour trancher toute question controversée relative au traité. Il s'agit là de l'expression d'un accord entre les parties quant à l'interprétation de l'expression «con objetos de comercio» contenue dans le traité, intervenue après son entrée en vigueur. Il faut lui donner effet : cette expression se traduit en anglais par «for the purposes of commerce».

b) La pratique subséquente n'offre guère de doutes : «aux fins du commerce»

49. La pratique subséquente des Parties illustre également quelle est l'interprétation correcte. On pourrait même dire qu'au début le Nicaragua a été très soucieux de voir les droits du Costa Rica respectés, et ceci même relativement aux traités qu'il a conclus avec des Etats tiers. L'on en veut

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[174] RCR, par. 3.41-3.42.

[175] Declaration of the Government of the Democratic and Popular Republic of Algeria; Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect of the Declaration of the Government of the Democratic and Popular Republic of Algeria; Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *ILM*, 1981, vol. 20, p. 223. *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1994*, p. 112, par. 17.

pour preuve, les traités conclus par le Nicaragua avec la France en 1859 et avec la Grande-Bretagne en 1860, dans lesquels le Nicaragua lui-même stipule que rien de ce qui est contenu dans ces traités ne devra être compris de façon à affecter la réclamation du *Gouvernement et des citoyens de la République de Costa Rica* à un libre passage par la rivière San Juan pour leurs *personnes* et leurs propriétés de l'océan et vers l'océan[176].

50. Afin de minimiser leur importance, l'Etat défendeur prétexte que les traités en question concernaient des «revendications» costa-riciennes et non des «droits»[177]. L'explication de l'emploi de ce terme peut résider dans le fait que les deux traités répètent presque mot pour mot un article semblable contenu dans le traité que le Nicaragua avait conclu avec les Etats-Unis en 1857, c'est-à-dire juste avant la conclusion du traité Cañas-Jerez[178].

51. On peut discuter du sens du mot «revendications» figurant dans ces traités, mais je vous ferai grâce, Monsieur le président, d'une telle démarche. Il suffit de signaler qu'il est pour le moins bizarre — pour ne pas dire surprenant — qu'un Etat A insère, dans un traité conclu avec un Etat B, une clause sauvegardant des «revendications» d'un Etat C, qui, de plus, vont à l'encontre de la position juridique que A aurait contre C. Une chose est sûre : même si le Nicaragua donnait une interprétation correcte de ce terme — *quod non* —, il demeure incontestable qu'à l'époque de la conclusion du traité Cañas-Jerez et après, le Nicaragua interprétait la position costa-ricienne comme signifiant *aussi bien le transport de personnes que de marchandises*, un transport *tant public (du gouvernement)* que *privé (des particuliers)*.

52. La pratique ultérieure témoigne aussi d'une interprétation commune de l'article VI. A vrai dire, le droit de libre navigation du Costa Rica sur le San Juan a davantage été exercé pour le transport de personnes (personnes privées ou fonctionnaires publics) que de marchandises[179], et ce

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[176] Voir respectivement RCR, vol. 2, annexe 14 (article XXXIII) et annexe 15 (article XXVI) (dossier de plaidoiries, onglets n° 28 et 29).

[177] DN, vol. I, par. 3.94.

[178] RCR, vol. 2, annexe 10 (article XX) (dossier de plaidoiries, onglet n° 30).

[179] Voir, entre autres : déclaration sous serment de Carlos Lao Jarquín, 27 janvier 2006, MCR, vol. 4, annexe 84 ; déclaration sous serment de Geovany Navarro Garro, 27 janvier 2006, MCR, vol. 4, annexe 85 ; Pablo Gerardo Hernández Varela, 27 janvier 2006, MCR, vol. 4, annexe 86 ; déclaration sous serment de Santos Martín Arrieta Flores, 27 janvier 2006, MCR, vol. 4, annexe 87 ; déclaration sous serment de Carlos Luis Alvarado Sánchez, 27 janvier 2006, MCR, vol. 4, annexe 88 ; déclaration sous serment de Daniel Soto Montero, 27 janvier 2006, MCR, vol. 4, annexe 89 ; déclaration sous serment de Luis Ángel Jirón Angulo, 28 janvier 2006, MCR, vol. 4, annexe 90 ; Marvin Hay Gonzalez, 28 janvier 2006, MCR, vol. 4, annexe 91 ; Armando Perla Pérez, 28 janvier 2006, MCR, vol. 4, annexe 92.

fait n'a pas été contesté par le Nicaragua, sauf à partir de la naissance de ce différend. En témoigne son attitude en 1980-1982, lorsqu'il a intercepté des navires d'une compagnie de tourisme costa-ricienne, ou lorsqu'il a tiré contre une embarcation du ministère de la santé, en invoquant des problèmes de sécurité liées à la guerre civile et non pas parce qu'il aurait perçu cette navigation comme étant contraire à l'article VI[180].

53. Je mentionnerai aussi l'article premier de l'accord de 1956[181], qui pose l'obligation de faciliser et d'accélérer la circulation sur le San Juan, de la même manière qu'il le fait pour la route panaméricaine. Si, comme le Nicaragua l'affirme, le Costa Rica n'a pas utilisé le San Juan pour l'exportation de marchandises, alors de quelle circulation l'accord de 1956 parle-t-il[182] ?

54. D'autres éléments de la pratique subséquente ressortent des déclarations faites par des ministres nicaraguayens, ainsi que d'autres accords entre les parties concernant des questions spécifiques de navigation et d'utilisation du San Juan[183]. Ils tendent tous vers la reconnaissance du droit de libre navigation comprenant la communication, le transport de personnes et de marchandises.

55. Que cette pratique ultérieure reflète ou non un accord intervenu dans l'interprétation du traité, elle étaye dans les deux situations l'interprétation faite de l'expression «*con objet de comercio*» suivant le sens ordinaire à attribuer à ces termes[184].

c) La pratique jurisprudentielle confirme également l'interprétation costa-ricienne

56. Comme on le sait, c'est la troisième fois que le Costa Rica est contraint de s'adresser à une instance juridictionnelle pour obtenir le respect par le Nicaragua du traité Cañas-Jerez. Les décisions des instances précédentes confirment l'interprétation costa-ricienne de l'article VI.

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[180] Lettres adressées par la direction de *Swiss Travel Services* au ministère costa-ricien de la sécurité publique et au ministère des affaires étrangères (MCR, vol. 6, annexes 223, 224 et 225). "Nicaragua conditions navigation on the waters of the San Juan River", *La Nación*, San José, 8 novembre 1980 (MCR, vol. 5, annexe 111).

[181] MCR, vol. 2, annexe 24 (dossier de plaidoiries, onglet n° 4).

[182] Article premier de l'accord complémentaire à l'article IV du pacte d'amitié, 9 janvier 1956, NURT, vol. 1465, p. 227. MCR, vol. 2, annexe 24 (en anglais).

[183] Lettre du 27 juillet 1897 adressée par le secrétaire de la Diète de la République Majeure de l'Amérique centrale au ministre des affaires étrangères du Costa Rica, MCR, vol. 3, annexe 37 ; Nicaragua, ministère des affaires étrangères, *Situación jurídica del Río San Juan*, Managua 1954, MCR, vol. 6, annexe 219 ; Nicaragua, ministère des affaires étrangères, *Situación jurídica del Río San Juan*, Managua, 1974, MCR, vol. 6, annexe 222.

[184] Voir *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999*, p. 1096, par. 80.

i) La sentence Cleveland

57. Le Nicaragua n'a pas examiné les plaidoiries qu'il a invoquées devant l'arbitre Cleveland. S'il était vrai que l'article VI visait à accorder au Costa Rica un droit de naviguer sur le San Juan uniquement pour transporter des marchandises, pourquoi cet argument n'a-t-il pas été soulevé par le Nicaragua devant le président Cleveland pour nier le droit de navigation aux navires de guerre ou du service fiscal du Costa Rica ? Cela aurait pourtant fourni l'argument le plus évident : par définition, ni les navires de guerre, ni les navires du service fiscal sont destinés à transporter des marchandises. Le président Cleveland ne s'est pas davantage servi de cet argument. Pire encore (pire pour le Nicaragua, bien sûr) : l'arbitre a interprété l'article VI comme permettant la navigation de navires fiscaux — et armés — du Costa Rica afin de protéger la navigation aux fins du commerce. Tout cela paraît très étrange si l'on suppose un seul instant que l'interprétation fantaisiste que le Nicaragua avance aujourd'hui est correcte.

58. Le président Cleveland a explicitement mentionné l'expression présentement controversée. Dans sa sentence, l'arbitre indique que le Costa Rica «peut naviguer sur ledit fleuve avec des bateaux du service des douanes dans l'exercice du droit d'usage de ce fleuve «aux fins du commerce» — droit que lui reconnaît ledit article — ou dans les cas nécessaires à la protection de ce droit d'usage»[185]. Ce passage tiré de la sentence arbitrale n'admet pas deux interprétations différentes. La lecture nicaraguayenne aboutirait au résultat absurde de l'exercice d'un droit d'usage du fleuve aux «articles de commerce».

ii) L'arrêt de la Cour de justice centraméricaine

59. Dans son arrêt de 1916 la Cour de justice centraméricaine évoque «le droit indiscutable [du Costa Rica] de naviguer librement sur le fleuve»[186] et, paraphrasant l'article VI, utilise la formule synonyme espagnole «*para fines comerciales*» pour expliquer ce que cet article entend par «*con objetos de comercio*»[187]. L'arrêt de 1916 affirme que le traité conclu en 1858, comme il a été interprété par la sentence Cleveland, «met sur un pied d'égalité les navires costa-riciens du service

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[185] Original en anglais : «may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the «purposes of commerce» accorded to her in said article, or as may be necessary to the protection of said enjoyment» (MCR, vol. 2, annexe 16).

[186] MCR, annexe 21, chapitre II, section IV.

[187] MCR, annexe 21, chapitre III, *a)*. Texte original en espagnol : MCR, vol. 1, p. 23, note 53 (dossier de plaidoiries, onglet n° 3).

fiscal avec les navires marchands, et ceci afin de pouvoir protéger les droits de ces derniers, ou pour réaliser les objectifs commerciaux susmentionnés»[188].

60. L'arrêt de la Cour de justice centraméricaine réaffirme ainsi le droit de libre navigation des navires privés et publics costa-riciens. Il possède valeur de chose jugée.

d) Les règles pertinentes du droit international applicables en la matière

61. Le Nicaragua a déployé beaucoup d'efforts pour refuser toute pertinence aux règles générales relatives aux cours d'eaux internationaux[189]. Nous sommes d'accord pour considérer que le traité Cañas-Jerez constitue une *lex specialis*, mais cela ne prive nullement les règles générales de leur pertinence. Elles servent à interpréter les concepts utilisés par le traité Cañas-Jerez. Mon collègue et ami, le Professeur Lucius Caflisch s'y est déjà référé.

D. L'objet et le but du traité ne modifient nullement l'interprétation de l'article VI

62. L'effort nicaraguayen de démontrer que l'objet et le but du traité visaient simplement à établir la frontière ne vient en rien appuyer sa nouvelle interprétation de l'article VI. Au contraire. Il existait un différend concernant le San Juan et on désirait régler les questions relatives à la possible construction d'un canal interocéanique. La souveraineté sur les eaux fut accordée au Nicaragua *sous condition* de la reconnaissance d'un droit perpétuel de libre navigation au Costa Rica. Le Nicaragua semble l'oublier, même si de temps en temps il l'accepte formellement du bout des lèvres[190]. Il ne ressort nullement que l'expression *«con objetos de commercio»* doit être comprise dans un sens favorable au souverain des eaux et par conséquent comme signifiant «avec des marchandises».

Monsieur le président, j'ai environ sept minutes pour conclure. Si vous le souhaitez, je continue jusqu'à la fin ou je m'arrête maintenant.

The PRESIDENT : Thank you, Professor Kohen. I think you can continue.

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[188] MCR, vol. 2, annexe 21, chapitre III, *a)*.

[189] CMN, par. 3.3.1-3.3.10 ; DN, par. 2.93-2.95.

[190] CMN, par. 5.1.13 ; DN, par. 2.67.

M. KOHEN : Thank you very much.

E. Les moyens complémentaires d'interprétation confirment eux aussi la position costa-ricienne

63. Passons rapidement à l'emploi des moyens *complémentaires* d'interprétation, qui semblent être pour le Nicaragua, les moyens *fondamentaux* d'interprétation : la pratique précédente — en effet, on ne peut pas parler ici de *travaux préparatoires* — et les circonstances dans lesquelles le traité a été conclu.

a) La pratique précédente des Parties confirme le droit de libre navigation *aux fins du commerce*

64. Le Nicaragua fait grand cas de ce qui aurait été le principal objectif du Costa Rica lors des négociations entre les Parties, à savoir la possibilité d'exporter du café en empruntant le San Juan, pour conclure que le seul droit qu'il tirerait de l'article VI du traité Cañas-Jerez serait le transport de marchandises[191].

65. Ce qui était vital pour le Costa Rica était l'utilisation du San Juan comme voie d'accès à l'Atlantique, non seulement pour l'exportation du café, mais également de manière générale, comme voie de contact avec la partie caribéenne de son territoire, ainsi qu'avec l'Europe. A supposer même que son intérêt principal eût été à l'époque l'exportation de café, n'importe quel dirigeant politique ou négociateur aurait eu à l'esprit l'utilisation générale du fleuve. De plus, nous l'avons dit dans notre mémoire[192] sans rencontrer de contradiction, l'importante population européenne, ayant migré vers le Costa Rica, a largement emprunté le San Juan.

66. Pour justifier son interprétation des précédents au traité Cañas-Jerez, la tactique constante du Nicaragua a été de mélanger deux choses bien différentes : la navigation sur le San Juan, d'une part, et la libre exportation des marchandises costa-riciennes à partir du port nicaraguayen de San Juan del Norte, d'autre part, sans paiement de droits de douane ou d'autres

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[191] CMN, par. 4.1.35 ; DN, par. 3.23-3.24 et 3.29-3.31.

[192] MCR, par. 4.60.

taxes[193]. Les marchandises sont concernées par l'objectif du non-paiement de droits de douane et non par la navigation sur le San Juan !

67. Nous avons déjà contré la tentative du Nicaragua d'assimiler la navigation en général et le transport de marchandises en particulier[194]. A titre d'exemple, je me contenterai ici de réfuter la présentation d'un nouveau cas cité dans la duplique nicaraguayenne. Il s'agit des instructions données en 1838 à Don Francisco Oreamuno, négociateur costa-ricien[195]. A en croire le Nicaragua, l'instruction n° 17 imposait à Oreamuno la tâche d'obtenir la liberté de navigation sur le San Juan pour tous les articles d'importation et d'exportation[196]. Une fois encore, nos contradicteurs semblent avoir un sérieux problème avec l'interprétation des textes. En effet, le texte de l'instruction 17 dit : «[Le négociateur] stipulera la liberté du Costa Rica de naviguer le fleuve San Juan et la liberté du droit d'exportation de ses fruits par le même fleuve…»[197]. Le Nicaragua a allègrement ignoré la conjonction «et» qui ajoute la liberté d'exporter ses produits à la liberté de navigation. En aucun cas, il ne s'agit d'obtenir la seule navigation avec des marchandises d'exportation. Naturellement, la liberté d'exporter ses fruits signifie la non-soumission à des droits de douane des marchandises exportées par le Costa Rica en passant par territoire nicaraguayen.

68. En conséquence, ni les instructions des négociateurs costa-riciens, ni les traités précédents non ratifiés ne permettent d'interpréter l'article VI du traité Cañas-Jerez à la manière du Nicaragua. Au contraire, ils montrent que l'objectif minimum permanent du Costa Rica a toujours été de pouvoir naviguer librement sur le San Juan.

b) *Les instruments internationaux conclus par des Etats tiers à l'époque confortent aussi l'interprétation costa-ricienne*

69. Les circonstances dans lesquelles le traité Cañas-Jerez a été conclu sont connues[198]. Cela ne modifie en rien l'interprétation textuelle et contextuelle de l'article VI. Je me référerai à un

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[193] DN, par. 3.32-3.44.

[194] RCR, par. 2.54.

[195] CMN, annexe 87.

[196] DN, par. 3.33.

[197] CMN, annexe 87.

[198] MCR, par. 2.12-2.27 ; CR 2009/2 (Brenes), par. 24.

autre aspect connexe, existant au moment de la conclusion du traité : les traités concernant des questions de navigation fluviale conclus par des Etats tiers à la même époque.

70. Lorsque les Etats voulaient apporter à l'époque des restrictions à la navigation sur un fleuve, ils le faisaient explicitement. Ainsi l'article premier de l'acte de navigation sur le Danube de 1857 précise que la libre navigation «sous le rapport du commerce» doit se conformer, non seulement à l'acte de navigation lui-même mais aussi, «aux règlements de police fluviale» de l'Etat concerné[199]. On ne trouve rien de semblable à l'article VI du traité Cañas-Jerez.

F. Le jeu nicaraguayen de l'interprétation «évolutive» n'a aucune pertinence

71. Nos amis de l'autre côté de la barre aiment Don Quichotte. C'est pourquoi ils se battent à nouveau contre un moulin à vent. A les entendre, le Costa Rica voudrait donner une interprétation «évolutive» au traité Cañas-Jerez[200].

72. Le problème, bien entendu, n'est pas là. Le Nicaragua lui-même admet que tout ce qui constitue aujourd'hui une «marchandise» tomberait sous le coup du droit de navigation «avec des articles de commerce», même si ces marchandises n'existaient pas en 1858[201].

73. En effet, si l'affirmation nicaraguayenne relative aux marchandises est vraie, alors elle doit également s'appliquer aux «fins du commerce». Toute finalité commerciale considérée comme telle aujourd'hui sera couverte par le traité de 1858, même si cette finalité commerciale n'existait pas à l'époque de sa conclusion[202].

CONCLUSION

74. Monsieur le président, Messieurs les juges, l'argument principal du Nicaragua pour tenter d'échapper au respect de l'article VI du traité Cañas-Jerez repose sur une construction bien fragile. C'est un artifice récent qui ne peut tromper personne. Quiconque lisant l'article VI sans parti pris aboutira à la même conclusion : l'expression en cause se réfère aux fins du commerce, et non aux marchandises. Et les fins du commerce comprennent aussi bien le transport de

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[199] 117 *CTS* 474 ; MCR, par. 4.09.

[200] DN, par. 3.96.

[201] CMN, par. 4.3.24.

[202] *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77 ; *Affaire concernant le Filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France*, sentence du 17 juillet 1986, *RSA*, vol. XIX, p. 247, par. 37.

marchandises que celui de personnes et la communication entre les diverses régions géographiques mentionnées par le même article, tant par des navires privés que publics.

75. Je vous remercie, Monsieur le président, Messieurs les juges, de votre patience. Ainsi s'achève la première journée des plaidoiries du Costa Rica.

The PRESIDENT: I thank Professor Marcelo Kohen for his presentation. I would like to thank him in particular for his co-operation in trying to keep his remarks within the time-limit for this morning. Tomorrow the Court will continue to hear the oral pleadings by Costa Rica in its first round at 10 o'clock. The meeting is adjourned.

The Court rose at 1.15 p.m.

CR 2009/3

International Court of Justice	**Cour internationale de Justice**
THE HAGUE	**LA HAYE**

YEAR 2009

Public sitting

held on Tuesday 3 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua)**

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le mardi 3 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)**

COMPTE RENDU

Present:	**President**	**Owada**
	Judges	**Shi**
		Koroma
		Al-Khasawneh
		Buergenthal
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Judge *ad hoc*	**Guillaume**
	Registrar	**Couvreur**

The Government of the Republic of Costa Rica is represented by:

H.E. Mr. Edgar Ugalde, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

The Government of the Republic of Nicaragua is represented by:

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as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit International; Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

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Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit International de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the continuation of the first round of oral argument of the Republic of Costa Rica. The first person to take the floor is Professor Crawford. Professor Crawford, you may take the floor.

Mr. CRAWFORD: Mr. President, Members of the Court, it is an honour to appear before you on behalf of Costa Rica and before the Court in its new composition.

RIGHT OF NAVIGATION OF PUBLIC VESSELS

Introduction

1. My purpose is to outline Costa Rica's rights of navigation for public vessels. Article VI of the Treaty of Limits, which recognizes a perpetual right of free navigation for Costa Rica, does not distinguish between public and private vessels. I will outline the implications of this in the first part of my presentation.

2. The second part will address Costa Rica's rights of public navigation as they were affirmed in the Cleveland Award. Cleveland acknowledged that Article VI of the Treaty of Limits recognized a right of navigation for Costa Rican public vessels. This included navigation by armed public vessels.

3. The third part of my presentation will explain the right of Costa Rican public vessels to navigate on the San Juan in order to fulfil Costa Rica's obligation under Article IV of the Treaty of Limits to safeguard the river, and to defend the common Bay of San Juan del Norte.

Costa Rican public vessels enjoy the perpetual right of free navigation under Article VI

4. I turn to my first point. Under Article VI Costa Rican public vessels enjoy the same right of navigation for purposes of commerce as Costa Rican private vessels — there is no relevant distinction based on ownership of the vessel.

5. As Professor Kohen has explained, Costa Rica's treaty rights of navigation for the purpose of commerce includes navigation for the purposes of communication between villages and towns, or any point of the Costa Rican bank to any other point on both banks of the river where navigation is common, or to the interior of Costa Rica. Commerce includes communication. This navigation

may be by Costa Rican government officials or social service providers for the purpose of providing essential services to the local population. Normally these people would travel on public vessels.

6. Nicaragua contends that Costa Rican public vessels are not entitled to any right of navigation under Article VI, that the only right of navigation is that circumscribed by the Cleveland Award[1]. Nicaragua does not point to the text of Article VI to support its argument; there is nothing in Article VI which suggests such a distinction. The only evidence Nicaragua offers is a rhetorical question posed by Costa Rica in its argument before Cleveland, which formed part of its argument for a broad right of navigation for revenue vessels[2]. Nicaragua argues that the entire question of navigation by public vessels should be considered closed on the basis of the Cleveland Award[3].

7. Nicaragua's contention is based on two misrepresentations. First, the issue before Cleveland was not the extent of Costa Rica's rights to navigate with public vessels in general. It was carefully stated as: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"[4]. The fourth point of doubtful interpretation submitted by Nicaragua essentially repeated this language. It read: "If Costa Rica, who, according to Article VI of the treaty, has only the right of free navigation for the purposes of commerce . . . can also navigate with men-of-war or revenue cutters in the same waters?"[5] This fourth question was duplicative and was treated as such by Cleveland. Having answered the question in the second paragraph of his Award, he merely referred to that determination in response to the fourth question[6].

8. The issue arose because Nicaragua had objected to Costa Rica's attempts to exercise its rights under the Treaty of Limits by establishing a revenue guard based on the Colorado River[7].

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[1] RN, para. 2.140.

[2] RN, para. 2.138.

[3] RN, para. 2.143.

[4] Art. VI, Costa Rica-Nicaragua, Convention to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of 15 April 1858 (Esquivel-Roman), Guatemala, MCR, Ann. 16; CMN, Ann. 11. See also Cleveland Award. MCR, Ann. 26 p. 457 (p. 98).

[5] MCR, Ann. 207, p. 10.

[6] Third paragraph, point 8, President Cleveland Award, MCR, Ann. 26, p. 458 (p. 99).

[7] CMN, Ann. 28.

The revenue guard was established to reconnoitre the San Juan at least once a week, with the primary purpose of preventing contraband[8]. Nicaragua protested and in reply the Costa Rican Foreign Minister argued that Costa Rica, having the obligation to contribute to the custody and defence of the river, had "the right to make use of the indispensable means to comply with that duty"; he added that Costa Rica could "not exercise any jurisdictional act over" the waters of the river[9]. Against this background the Convention of 24 December 1886 asked Cleveland to decide on Costa Rica's right to navigate with revenue cutters and ships of war. The dispute concerned not the right to navigate with public vessels in general, but only navigation with those two types of vessel.

9. Nicaragua's second misrepresentation is that Costa Rica's pleading before Cleveland somehow put in issue the broader question of navigation by public vessels[10]. There are two answers to this.

10. First, as I have said, Costa Rica's arguments were limited to the specific question put to the arbitrator. Second, it would have been beyond President Cleveland's remit under the Convention of 1886 to decide the broader point.

11. Before Cleveland, Costa Rica's arguments dealt with navigation for revenue vessels and ships of war separately. Before turning to the specific arguments relevant to each type of vessel, Costa Rica asked a general rhetorical question in the following terms:

> "Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?"[11]

Costa Rica then turned to its specific arguments, dealing first with revenue vessels and then with ships of war.

12. In respect of revenue vessels, Costa Rica asserted as "beyond discussion that [it] can navigate in the San Juan river with public vessels, which are not properly men-of-war". Referring

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[8] MCR, Anns. 205, 206.

[9] MCR, Ann. 31.

[10] RN, paras. 2.142-3.

[11] MCR, Ann. 207, p. 155.

specifically to its revenue police, Costa Rica argued that the rights of Nicaragua under the 1858 Treaty to bring cargo to the Costa Rican banks presupposed the necessary, correlative right of Costa Rica "to watch its own banks by the only practicable means", otherwise Costa Rica would be at the mercy of smugglers[12].

13. The pleading then dealt with the right of navigation for ships of war, which Costa Rica supported by analogy with other situations. It argued again that its duty to defend its own bank under the Treaty implied a necessary correlative right to use regular men-of-war on the river[13].

14. Costa Rica made no further mention of other public vessels, stating "This is neither the proper time nor the proper place to make any declaration whatsoever, affecting questions not at issue, and neither debated nor submitted . . ."[14]

15. Cleveland evidently took heed of this statement, and his Award was carefully circumscribed. The second paragraph, which addresses the question included in Article VI of the 1886 Convention, holds that Costa Rica "has not the right of navigation of the river San Juan with vessels of war", but "may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or [or] as may be necessary to the protection of said enjoyment"[15]. Cleveland's language is not exclusive of other vessels. It is simply directed at the question he was asked to decide. In point 8 of the third paragraph, which addressed the fourth point of doubtful interpretation, Cleveland stated "The right of the Republic of Costa Rica to the navigation of the river . . . with men-of-war or revenue-cutters is determined and defined in the second article of this award."[16] If he had thought that he was determining the entire scope of Costa Rica's right to navigate with public vessels of any kind, he would have said that the second paragraph of his Award defined and determined that question. He did not say that, neither did he imply it.

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[12] MCR, Ann. 207, p. 156.

[13] MCR, Ann. 207, at pp. 158-160.

[14] MCR, Ann. 207 *(b)*, p. 90.

[15] MCR, Ann. 16, p. 457 (p. 98), second paragraph.

[16] MCR, Ann. 16, p. 458 (p. 99), third paragraph, point 8.

16. Moreover, if Nicaragua had thought that Cleveland was addressing all navigation by public vessels, its pleadings would have been directed accordingly — but it did not discuss navigation by public vessels other than those specified in the question[17].

17. In these circumstances to argue that the scope of navigation by public vessels is *res judicata* and that Costa Rica asks this Court to *"reverse"* the Cleveland Award[18], is absurd.

18. By tying navigation by public armed vessels to the circumstances set out in Article VI of the Treaty, Cleveland rejected his assistant Rives' suggestion that any right of navigation for public vessels would only exist by some general rule and could not derive from the Treaty[19]. This is confirmed by Cleveland's formulation, which refers to the right of navigation for revenue service vessels as being "under" the Treaty and its stipulations in Article VI specifically mentioned[20]. Rives' suggestion had been that Costa Rica would have only have those privileges actually extended to other friendly nations, what Cleveland decided was that Costa Rican revenue service vessels had their own specific treaty right of navigation.

19. Costa Rica's consistent position has been that its public vessels enjoy the same perpetual right of free navigation under Article VI as private vessels. This is entirely consistent with Cleveland's approach.

Costa Rica's treaty right of navigation on the river, affirmed by the Cleveland Award, includes navigation by armed public vessels

(a) *The Cleveland Award affirmed a right of navigation for revenue vessels which are armed public vessels*

20. I turn now to Cleveland's Award in relation to armed public vessels, specifically revenue service vessels.

21. As I have already explained, Cleveland's treatment of this question was carefully phrased to reflect the terms of his grant of jurisdiction. His Award stated:

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[17] MCR, Ann. 208 *(b)*, pp. 48-49.

[18] RN, para. 2.142.

[19] Cf. Rives Report (Second), CMN Ann. 70, p. 1, "The foregoing article, it will be observed, is silent as to the right of navigation by public vessels. If such a right exists, it must be by virtue of some general rule and not affected by the Treaty . . ."

[20] MCR, Ann. 26, p. 457 (p. 98), second paragraph.

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation on the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[21]

22. It is beyond dispute that these vessels of the revenue service were armed public vessels. Costa Rica's argument in respect of revenue service vessels referred to the need to protect its commerce and its banks of the river, which protection implied the carrying of arms[22]. Nicaragua referred to vessels of the revenue service as "armed vessels, capable of enforcing their demands by force"[23]. Rives' report suggested that revenue service vessels were indistinguishable from vessels of war[24]. But Cleveland's Award distinguished between the two, referring to the functions of revenue service vessels as "protection" of Costa Rican navigation for purposes of commerce. "Protection" would be futile without the capacity to carry arms.

23. President Cleveland was certainly aware of the uses of revenue cutters, which were lightly armed vessels used for customs, quarantine and revenue enforcement and for a range of other purposes[25]. In May 1886, President Cleveland personally arranged for a revenue cutter to meet the ship carrying his fiancée, Frances Folsom, to New York. The cutter *William E Chandler* brought Miss Folsom and her party into the harbour, followed by a boatload of reporters keen on a glimpse of the President's young bride[26]. The *Chandler* measured 99 feet and carried one 20-pounder gun[27]. Its characteristics are similar to those of the cutter, the *Forward*, shown on the screen[28] (tab 32 in the judges' folder). Despite extensive archival research we were not able to find

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[21] MCR, Ann. 26, p. 457 (p. 98), second paragraph.

[22] MCR, Ann. 207 *(b)*, p. 156.

[23] MCR, Ann. 208 *(b)*, p. 49.

[24] Rives Report (Second), CMN, Ann. 70, p. 4.

[25] MCR, 4.81.

[26] "The President's Wedding", *Washington Post*, 29 May 1886 (available at http://pqasb.pqarchiver.com/washingtonpost/search.html). See also "Miss Folsom's Return", *New York Times*, 28 May 1886 (available at http://query.nytimes.com/mem/archive-free/pdf?res=9C0CE2DC1738E533A2575BC2A9639C94679FD7CF); "Miss Folsom's Homeward Trip", *New York Times*, 29 May 1886 (available at http://query.nytimes.com/mem/archive-free/pdf?res=9500E0DC1738E533A2575AC2A9639C94679FD7CF); Stephen F. Robar, *Frances Clara Folsom Cleveland* (Nova History Publications: New York, 2002), p. 20.

[27] See http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf; D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), p. 38.

[28] http://www.coastguardpics.com/imagelib/sitebuilder/misc/show_image.html?linkedwidth=actual&linkpath=http://www.coastguardpics.net/sitebuildercontent/sitebuilderpictures/usrcforward_resize.jpg&target=tlx_new; see D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), p. 45.

a photograph of the *William E. Chandler*. The *Chandler* was still in service at the time of the Cleveland Award, two years after Cleveland's marriage to Miss Folsom[29]. So when Cleveland referred to revenue cutters he knew what he was talking about! In these circumstances, Nicaragua's argument that the Cleveland Award did not affirm a right of navigation for public armed vessels other than men-of-war cannot be sustained[30].

24. The Cleveland Award specified the scope of Costa Rica's right of armed navigation by revenue service vessels under two heads: (1) "as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in Article VI"; or (2) "as may be necessary for the protection of said enjoyment"[31]. In its familiar attempt to limit Costa Rica's rights of navigation to the extent that they become meaningless, Nicaragua argues that these requirements are cumulative rather than alternative[32]. But clearly that is wrong: Cleveland used the conjunction "or" and not "and". In a further alternative, Nicaragua argues that the concept of necessity applies to navigation by revenue vessels under any circumstances[33]. This is not the case, since only navigation for the protection of Costa Rica's enjoyment of its right of navigation was subject to this requirement.

25. Nicaragua also seeks to limit Costa Rica's treaty rights of navigation by reference to later negotiations which did not result in a concluded agreement. It claims that the Soto-Carazo Treaty of 26 July 1887[34], which was ratified by Costa Rica but not by Nicaragua, indicated that Costa Rica's right of navigation did not comprise any right to navigate with revenue service vessels. But unratified treaties do not change the law or the meaning of earlier treaties in force. And even if the 1887 Treaty could be said to reflect Costa Rica's understanding of its existing rights and obligations, it affirms Costa Rica's right of navigation for purposes of re-supply of police posts and relief of personnel[35]. Today Nicaragua denies that that right exists. I would add

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[29] D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), xiii.

[30] Cf CMN, 4.2.15.

[31] MCR, Ann. 26, p. 457 (p. 98), second paragraph.

[32] For example, RN, 3.1.54-55.

[33] Cf RN, para. 5.45.

[34] MCR, Ann. 15.

[35] MCR, Ann. 15, Art. VIII.

that the unratified 1887 Treaty would have given Costa Rica the right of navigation over the whole length of the San Juan River and the Lake of Nicaragua[36]. In these circumstances it cannot serve as an aid to the interpretation of the treaty of limits.

26. In its 1916 decision, the Central American Court of Justice acknowledged the extent of Costa Rica's rights of navigation with revenue service vessels. Costa Rica's argument was as follows:

> **"with regard to the San Juan River, the conventional rights of Costa Rica are, in a certain aspect, less than the corresponding rights of co-ownership . . . Costa Rica, for example, cannot ply that stream with war vessels as, of course, Nicaragua can do; but, on the other hand, those rights are greater than those of a mere co-owner . . . because the Costa Rican vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the whole river . . . and free access, exempt from imposts, to any point on the Nicaraguan shore."[37]**

27. In its Judgment, the Court agreed in principle with this argument, holding that:

> **"the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes — an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty"[38].**

28. The revenue vessels used at the time of the Cleveland Award were engaged in fiscal control, border protection and other police tasks, and the relevant personnel carried service arms. Now these tasks are performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civic Guards[39]. Thus Costa Rica's treaty right of navigation affirmed in the Cleveland Award covers navigation by public vessels carrying police with service arms for purposes of re-supply of police posts and revenue personnel, and you can see the boats, formidable as they are, on the screen (tab 33 in the judges' folder).

29. That Costa Rican police may navigate with service arms is also consistent with the 1956 Agreement. That Agreement requires the Parties to "arrange for the supervision of their common border as a means of preventing the illegal entry of either weapons or armed groups from the

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[36] MCR, Ann. 15, Art. IV.

[37] MCR, Ann. 21, p. 197.

[38] MCR, Ann. 21, p. 220.

[39] See MCR, App. B.

territory of one of the Parties into the territory of the other"[40]. That task could only be performed by Costa Rica, either by navigating on the San Juan with service arms or through its police posts on the bank, which in turn implies navigation for the purposes of re-supply and relief of personnel. There is no other way those tasks can be performed.

(b) ***This right is confirmed by subsequent practice***

30. The right for public vessels to navigate on the lower part of the San Juan with arms is consistent with subsequent practice. On the one hand, Costa Rica respected Cleveland's prohibition on navigation with vessels of war. On the other hand, it continued to navigate with armed personnel on revenue cutters or other — mostly very much smaller — public vessels and Nicaragua respected that right.

31. The pleadings in the present case refer to the incident of the *Adela* in 1892. The journey of the *Adela* is explained in sketch-map 1, which is in your folder at tab 35.

The PRESIDENT: Professor Crawford, could you speak a little more slowly.

Mr. CRAWFORD: Yes, of course, Sir.

The Costa Rican steamer the *Adela* travelled with arms from the mouth of the San Carlos River along the San Juan to the point 3 miles below Castillo Viejo — which, you will recall, is the limit of the sector of the San Juan in which Costa Rica has rights of navigation. Its mission was to install guards at the fiscal post at Terrón Colorado, Los Chiles, which is within Costa Rican territory near the source of the San Juan in Lake Nicaragua. It stopped 3 miles below Castillo Viejo and left its arms and ammunition on the Costa Rican bank. Beyond that point, Costa Rica has no right of navigation at all. The Commander of the *Adela* then continued to the Nicaraguan post at Castillo Viejo to request permission to navigate with arms for the remainder of the journey. That permission was refused, and the Costa Rican Commander was obliged to transport the arms and ammunition by land[41]. But the point here is that the *Adela* travelled with arms and ammunition on the lower San Juan, where Costa Rica has a treaty right of navigation, and did so without any specific grant of permission.

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[40] MCR, Ann. 24, Art. II.

[41] MCR, Ann. 209.

32. Later that year, authorization was given for Costa Rica to navigate with armed vessels in the upper part of the river. The Nicaraguan Customs Administrator in San Juan del Norte authorized the Costa Rican guard of El Colorado to pass beyond Castillo Viejo, for the purpose of any mission in Rio Frio, which is west of Castillo Viejo towards Lake Nicaragua[42]. Consistent with Costa Rica's treaty right of navigation, there was no need for authorisation on the lower part of the San Juan and no authorization was given in relation to that part.

33. Costa Rica has also submitted documentary evidence of the navigation of its revenue and fiscal guards on the river[43] supported by affidavits and correspondence. The evidence suggests that the revenue guard fulfilled the functions it was required to perform under the Decree of 1886, which included reconnoitring the river on a weekly basis[44]. In more recent times, these functions were fulfilled by the Costa Rican police and the annual reports of these police indicate that it was usual for them to patrol the San Juan[45]. There is also documentary evidence of the practice of supplying and relieving Costa Rican border posts on the river[46] until 1998, when Nicaragua prohibited all navigation by Costa Rican public vessels[47], in breach of the Treaty and the Cleveland Award.

34. Nicaragua argues that Costa Rica has inflated the number of journeys on the river since not every entry in the report expressly mentions the river[48]. But it is physically impossible to travel from one specified place to another by boat without transiting the river: for example, from the border post at Sarapiquí to Remolinito, Tigra or La Cureña[49], or from the Sarapiquí to Delta Costa Rica[50], you have to go on the river (tab 34 in the judges' folder).

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[42] MCR, Ann. 210.

[43] MCR, Anns. 211, 212, 213, 214, 215 and 216; RCR Anns. 31 to 38.

[44] MCR, Ann. 206, Art. 5th.

[45] RCR, Ann. 38.

[46] MCR, Ann. 227.

[47] MCR, Anns. 240, 131, 132.

[48] RN, para. 5.78.

[49] RCR, Ann. 36, p. 252; RCR, Ann. 37, p. 253.

[50] MCR, Ann. 227, p. 934.

35. Costa Rica's practice of navigating with arms in this case demonstrates that there is a necessity for such navigation. Indeed, the police post at La Cureña had to be closed due to a lack of alternative access, and other posts on the river are operating at a lower level of efficiency[51]. But Costa Rica's rights are perpetual and unconditional; they are not dependent on the existence of a need.

36. To its Rejoinder, Nicaragua attached affidavits of officers of its army and other individuals, including one who was a member of two successive revolutionary movements — for him the revolution was indeed permanent[52]! Five of these affidavits are from commanders who were responsible for security on the river between 1979 and 2006[53]. Nicaragua claims that this supports its argument that Costa Rica "routinely requested and obtained prior authorization from Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts"[54]. No documentary evidence supports any of these affidavits. My colleague, Sergio Ugalde, has discussed the affidavit of Mr. Walter Navarro Romero[55], which the Court kindly allowed us to produce in rebuttal. Mr. Navarro emphatically denies that he or his predecessors requested permission to navigate on the San Juan[56].

37. Indeed, one of Nicaragua's own affidavits confirms that there was a practice of the Costa Rican civil guard vessels navigating on the river in the 1960s and 1970s[57].

38. In addition, the Cuadra-Lizano Joint Communiqué suggests that the *status quo ante* did not involve a requirement of authorization, as distinct from giving notice.

39. Costa Rica's position has been consistent — before 1998, Costa Rican public vessels would notify Nicaraguan authorities of their navigation but would not obtain prior authorization because they were exercising an existing right. This is expressly stated in the note of the

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[51] RCR, para. 3.94.

[52] RN, Ann. 68 (Carrión affidavit); RN, Ann. 69 (Centeno affidavit); RN, Ann. 73 (Membreño affidavit); RN, Ann. 72 (Largaespada affidavit); RN, Ann. 78 (Talavera affidavit); RN, Ann. 77 (Sánchez affidavit), Ann. 70 (García affidavit); and RN, Ann. 75 (Pastora affidavit).

[53] RN, Ann. 69 (Centeno); RN, Ann. 78 (Talavera); RN, Ann. 73 (Membreño); RN, Ann. 72 (Largaespada); and RN, Ann. 77 (Sánchez).

[54] RN, para. 5.80.

[55] Ann. IV to letter filed 27 Nov. 2008.

[56] Ann. IV to letter filed 27 Nov. 2008, para. 4.

[57] RN, Ann. 65, p. 404, para. 6.

Costa Rican President of June 2000 to his Nicaraguan counterpart: he suggested that the system of notification which applied before 1998 be reinstated[58].

The PRESIDENT: Excuse me, the translator finds it very difficult to catch up with you.

Mr. CRAWFORD: I am sorry, I will go even slower, Sir.

40. Nicaragua has produced — again in its Rejoinder — what it calls a "contemporaneous aide-memoire" of a meeting held between delegates from the Costa Rican Minister of Public Security and the Nicaraguan army in July 2000[59]. This aide-memoire is annexed to an affidavit of General Carrión of the Nicaraguan army[60]. There is no indication that it was approved or even seen by anyone from the Costa Rican side. The aide-memoire suggests that Colonel Alvarado, a member of the delegation from the Ministry of Public Security of Costa Rica, stated that the practice prior to 1998 was a system of authorization[61]. This suggestion is not corroborated, not even in the affidavit of Major Molina[62], said to have been the author of the aide-memoire. In the circumstances it should be given no weight.

41. In summary, Costa Rica has provided the Court with substantial documentary evidence, corroborated by affidavit evidence, supporting its claim of a consistent practice of navigating on the San Juan in exercise of its right of navigation for public vessels with service arms, on the basis of prior notification but without any requirement of authorization.

Costa Rican public vessels have a right to navigate on the San Juan which corresponds to its obligations to safeguard *(guarda)* the river and to contribute to its defence, as well as defence of the common bays pursuant to Article IV of the 1858 Treaty

42. I turn to my third point, which is that Costa Rica has a right of navigation corresponding to its obligations under Article IV of the Treaty concerning defence of the common bays, safeguarding the river and defence of the river in case of aggression.

43. These obligations are clear from the text of Article IV itself, which reads:

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[58] MCR, Ann. 64.

[59] RN, Ann. 68.

[60] RN, Ann. 68, p. 421, para. 11.

[61] RN, Ann. 68, aide-memoire, p. 423, para. 2.

[62] RN, Ann. 74.

> "The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and therefore, both the advantages of the use and the obligation to contribute to their defence shall also be common. Costa Rica shall be bound, as far as the portion of the banks of the San Juan river which correspond to it is concerned, to contribute to its custody in the same way as the two Republics shall contribute to the defence of the river in case of external aggression; and this they shall do with all the efficiency within their reach."[63]

44. The Central American Court of Justice, in its 1916 judgment, recalled the right and obligation of Costa Rica under Article IV in the following terms:

> "Costa Rica possesses undisputed title to the right bank of the river, to the land situated within her jurisdictional limits; she has joint ownership in the ports of San Juan del Norte and in Salinas Bay; she possesses the contractual right of perpetual navigation in the river, beginning at a point three miles below Castillo Viejo, accompanied by the full privilege of transit and commerce, and Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open; Costa Rica enjoys also the right to moor her vessels on both banks throughout the entire zone in which navigation is common, and the rights involved in guarding and defense 'with all means within her reach'."[64]

45. The first two obligations expressed in Article IV are permanent and continuing: they are to contribute to the defence of the common bays and to contribute to the custody of the river.

46. Safeguarding the river requires navigation. In the twentieth century, this obligation was understood as taking action to prevent trafficking and smuggling, and to counter threats to security such as the passage of insurgents or of weapons from one country to the other. Safeguarding the river was particularly important in the context of the tensions between the two States during 1948 and 1955. This led to the Treaty of Amity of 1949[65] and the further Agreement of 1956[66].

47. Nicaragua argues that Article IV should to be construed as requiring Costa Rica to discharge its obligations to safeguard and defend the river "only from her own banks"[67]. This is not the language used in Article IV, which requires Costa Rica to "contribute to [the river's] custody . . . with all the efficiency within [its] reach"[68]. Rives suggested that this phrase implied that Costa Rica's obligation could be fulfilled by "defence of the [river] by land"[69]. But again,

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[63] MCR, Ann. 7 *(b)*.

[64] MCR, Ann. 21, p. 222.

[65] MCR, Ann. 23.

[66] MCR, Ann. 24.

[67] RN, para. 5.10.

[68] MCR, Ann. 7 *(b)*.

[69] MCR, Ann. 71, p. 251.

President Cleveland took a broader view, and no such limitation was contained in the Cleveland Award. The words "within their reach" could equally mean "as far as possible", a reference to available resources and not physical location. Even if a physical limitation was to be implied into Article IV, given that much of the Costa Rican bank is inaccessible except via the river, Costa Rica's obligation to safeguard — whether from the bank or the river — necessarily entails a right to navigate on the river.

Conclusions

48. Mr. President, Members of the Court, Costa Rica has rights of navigation for public vessels which I have categorized under three heads. First, its public vessels enjoy the right of navigation recognized in Article VI. Second, its public vessels have a right of navigation with arms as recognized in the Cleveland Award, for navigation which is related to and connected with the enjoyment of the "purposes of commerce"; *or* navigation which may be necessary for the protection of its enjoyment of that right of navigation. This right is consistent with the practice of both States. Third, its public vessels have a right to navigate on the San Juan which corresponds and is the correlative of the obligations under Article IV of the Treaty, to safeguard and defend the river; these are affirmed by the 1956 Agreement, by which both States committed to common surveillance of the border for specified purposes.

Mr. President, I would ask you now to call upon Professor Caflisch, who will explain the unreasonableness of Nicaragua's purported regulation of Costa Rican navigation on the river.

The PRESIDENT: Thank you, Professor Crawford, for your statement. I now invite Professor Caflisch to take the floor.

Mr. CAFLISCH:

UNREASONABLENESS AND UNLAWFULNESS OF NICARAGUA'S REGULATIONS APPLIED TO NAVIGATION ON THE SAN JUAN RIVER

1. Nicaragua's right to regulate the river and its uses: the problem

1. Mr. President, Members of the Court, my intervention today will deal with the unreasonableness and unlawfulness of Nicaragua's regulations and measures related to the

navigation on the San Juan River by Costa Rican vessels. I shall first address the general issue of Nicaragua's right to regulate the river and its uses. The present status of the regulations applied and the measures taken by Nicaragua will be examined next. And finally, a few general conclusions will be drawn.

2. Mr. President, Members of the Court, as has been explained already in the present hearings, under the 1858 Treaty, the 1888 Cleveland Award and the 1916 judgment, the San Juan River is governed by a relatively complex régime. One element of that régime is the sovereignty exercised by Nicaragua over the waters and bed of the river. Another element is the perpetual right of free navigation enjoyed by Costa Rica. It has been shown already that there is no subordination between the two; in particular, the sovereignty of Nicaragua cannot be used to rob Costa Rica's right of navigation of all or part of its substance.

3. Regarding navigation on international watercourses, several systems are in use in Latin America. A first system is that of the "special concession" ("concesión especial"): the State exercising sovereignty over part of an international watercourse may, on the basis of its domestic law, allow the vessels of the other riparian or even non-riparian States to sail ships on that watercourse. Such permission, having been granted by *domestic law*, can be withdrawn or modified unilaterally according to the terms of that law. In that case, navigation by ships of the other States concerned amounts to a *privilege* rather than a right on the international level and, in that sense, is subordinated to the riparian State's sovereignty.

4. Under a second system, a State exercises full sovereignty over the waters of the river by virtue of a treaty but *subsequently*, again by treaty, grants a right of navigation to another State. This is, essentially, how Nicaragua views the present situation, this view leading her to assert that her sovereignty has precedence over Costa Rica's right of navigation when it comes to regulating the use of the San Juan River.

5. Finally, in a third system, one State exercises sovereignty over the waters of the river on the basis of *treaty provisions*, while another State, on the basis of a right deriving from that same treaty, is entitled to navigate on the river. Here there is a *treaty right* of navigation benefiting that other State which is on *an equal footing* with the sovereignty exercised by the first State. That

right cannot be modified or terminated unless otherwise provided in the treaty itself or agreed on by the States concerned, neither of which is the case here.

6. It is evident that the situation of the San Juan falls into the third rather than the second category: Nicaragua's sovereignty over the river and Costa Rica's perpetual right of free navigation flow from a single conventional source, the 1858 Treaty. This being so, the two elements are placed on an equal footing, and there is no presumption of supremacy of the one over the other.

7. Mr. President, Members of the Court, it is not the Court's task to engage in theoretical exercises such as elaborating a general definition of the attributions of Nicaragua as the territorial sovereign over the San Juan River. The Court's task is very specific: it has to determine what Nicaragua is and is not entitled to do if Costa Rica's right of navigation is to remain meaningful and effective instead of becoming an empty shell. Such a pragmatic approach could move along the following lines:

— *First*, Nicaragua enjoys territorial sovereignty over the waters and the bed of the San Juan River. The exercise of that sovereignty is, however, subject to Costa Rica's rights under the 1858 Treaty, as interpreted by the 1888 Cleveland Award and the 1916 judgment of the Central American Court of Justice.

— *Second*, the right to sail Costa Rican ships on part of the San Juan is perpetual and unconditional. No admission or permission by Nicaragua is required, and no measures substantially diminishing that right, or turning it into a mere privilege, can be tolerated.

— *Third*, Costa Rica's perpetual right of free navigation is absolute in that it exists for Costa Rica independently of the rights of others. It would exist even if Nicaragua, the territorial sovereign, were to refuse it to its own boats.

— *Fourth*, Costa Rica's right to sail ships on the San Juan River, while minimized by Nicaragua, was, is and will be of vital importance for both international and domestic purposes. Together with Costa Rica's main internal waterways — the San Carlos, the Sarapiquí and the Colorado —, it forms a communication network between points in inland Costa Rica, between Costa Rica and Nicaragua, and between Costa Rica and the sea via the San Juan and the Colorado. Accordingly, much more than movement on the main river to gain access to and from the sea is at stake: "comercio" on an inland water system in a country parts of which may be difficult of access, especially during the rainy season. This is one of the reasons why the right secured in 1858 is of such central importance to Costa Rica.

— *Fifthly*, it is basically up to Costa Rica to regulate and control the navigation of her ships on the San Juan, as it is up to Nicaragua to do so for her own vessels. This is one of the reasons why the presence of Costa Rican public vessels on the river is appropriate and necessary, as was indeed recognized by President Cleveland when, in his Award, he used the words "as may be related to and connected with her enjoyment of 'the purposes of commerce' accorded to her in said article [Article VI] or as may be necessary to the protection of said enjoyment"[70].

— *Sixth and finally*, the treaty régime of 1858 contains a series of other provisions showing that, in more ways than one, managing the San Juan River is a business transcending territorial barriers. That business should be transacted on the basis of co-operation between riparians; there is little point in constant references to the "sister republic" as long as there is friction instead of co-operation.

8. Mr. President, Members of the Court, the time has now come to turn to specifics, i.e., the question of whether the regulations in fact enacted and the measures in fact taken by Nicaragua may be regarded as reasonable and lawful when confronted with Costa Rica's right of navigation as recognized by the Cañas-Jerez Treaty of 1858.

2. Nicaragua's right to regulate the river and its uses: the present status

(a) *Introduction*

9. Mr. President, Members of the Court, let me, then, turn to the present status of the regulations applied and the measures taken by the defendant State in respect of navigation on the San Juan River. In her Rejoinder Nicaragua discusses at length the "reasonableness" of her navigation measures and regulations from the angles of: environmental protection and illegal logging; of prevention and control of criminal activities; of safety of navigation; and of border protection and security[71].

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[70] MCR, Vol. 2, Ann. 16, p. 98.

[71] RN, Vol. I, 4.34-4.98.

10. Before examining these regulations and measures one by one, one will note with interest the central place suddenly attributed to environmental issues in Nicaragua's arguments, especially as these issues were certainly not, in 1858, or even in 1888 and 1916, essential factors of the river's legal régime and as Nicaragua, when examining the general issue of interpreting the 1858 Treaty, resists attempts at doing so in an evolutionary manner[72].

11. One is delighted to note Nicaragua's satisfaction with her environmental performance in the San Juan River area, as one is gratified to learn how well the poison dart frog is faring on the northern shore of the river as well. One is less happy, however, with the avalanche of criticism heaped by Nicaragua on its neighbour: Costa Rica is alleged to have destroyed the environment on her side of the San Juan area by unbridled attacks on nature and natural resources and to have allowed human settlement on parts of her shore.

12. Mr. President, Members of the Court, I am aware of no rule of international law — treaty or other — precluding the settlement of the river's banks; and settlements can be found on the Nicaraguan side as well. That part of the river's Costa Rican shore has been populated — sparsely populated — is certainly no ecological crime, nor a violation of an international obligation, but — perhaps — a harbinger of economic progress. Furthermore, as a photograph reprinted in the Nicaraguan Rejoinder[73] fails to show, the Costa Rican shoreline is not cleared everywhere, nor are the Nicaraguan banks wooded throughout.

13. In addition, it is simply not true that Costa Rica has done little or nothing to protect the environment in the San Juan River area. She has, in fact, established four protected areas, on and around the right bank of the San Juan River. These areas, shown in the projection, are the corridor of the river (1), the Caño Negro (2), the Laguna Maquenque (3) and the Barra del Colorado area (4). On its banks of the river, Costa Rica applies policies for the protection of the environment and for preserving biodiversity.

14. Finally, it can certainly not be said that Nicaragua herself is ecologically pristine and blameless, witness the pollution of Lake Nicaragua or the sewer contamination in the town of

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[72] *Ibid.*, 2.56-2.57.

[73] RN, Vol. I, p. 193.

San Carlos[74]. The truth of the matter would seem to be that, to justify its campaign to reduce and erode the exercise of Costa Rica's perpetual right of free navigation under Article VI of the 1858 Treaty, the defendant State mainly relies on ecological arguments for lack of anything better.

15. Another preliminary point to be made is that while in certain areas where Costa Rica finds her right of navigation to be breached, this has been the consequence of the extension of the scope of *general regulations*, such as those on tourist cards and visas, and to the transit of Costa Rican ships on the San Juan River. On other issues, such as the imposition of timetables and of the prohibition of travelling on the San Juan River by night, there seem to be *specific regulations or instructions* emanating from the Nicaraguan army and setting the duty to hoist the Nicaraguan flag when transiting the San Juan River as well as a prohibition to travel by night[75]. There are finally measures for which there seem to be no legal basis at all, such as the requirement to stop at every Nicaraguan border post in the course of transit, except, of course, for the extension to the river of the general rules on visas and tourist cards. This shows that, when taking measures restricting Costa Rican navigation, Nicaragua paid little attention even to her own laws, the main objective of her actions being to hamper Costa Rican navigation on the San Juan.

16. I shall now turn to some of the regulations applied or measures enacted by Nicaragua to determine whether they are compatible with Costa Rica's right of navigation, that is: *first*, the obligation to stop and register, including immigration control and control of visa requirements; *second*, the obtaining of a departure clearance certificate; *third*, the prohibition to travel at night; and *fourth*, the obligation to carry the Nicaraguan flag.

The obligation to stop and register

17. Let me then turn to the obligation to stop and register. According to an affidavit presented by Nicaragua[76], the obligation to stop and register originated in the 1960s, Costa Rica having enacted similar rules on her domestic rivers connected with the San Juan[77]. It imposes on

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[74] See "Contaminación al lago fue anunciada", *El Nuevo Diario* (Managua), 31 Dec. 2005, http://impreso.elnuevodiario.com.ni/2005/12/31/nacionales/92/6.

[75] Points 6 and 7 of the Nicaraguan army's "Action Plan for Departure Clearance and Certificates in the San Juan river", RN, Vol. II, Ann. 48.

[76] RN, Vol. II, Ann. 65.

[77] *Ibid.*, Vol. I, 4.71.

Costa Rican ships the duty, upon entering the San Juan River, to stop and register at the first Nicaraguan border post. That duty is, according to the defendant State, "very minimal" and "non-intrusive"[78] and makes it possible to collect the names of passengers and to identify the cargo at the beginning and the end of every journey. In addition, stopping at every Nicaraguan border post is required unless the post is satisfied with a mere notice of passage. Regarding the protection of its environment, this will allow Nicaragua, so she says, to make sure, at the end of the day, that all those who were on the river have departed from it. The duty to stop and register applies, across the board, to all navigators, Costa Ricans and Nicaraguans alike, even Costa Rican children being carried to school or back home, every time they pass, the reason given being that they could fall off the boat[79]. Another objective to be achieved by the duty to stop and register is, according to Nicaragua[80], the prevention of the illegal occupation of land by persons coming from the Costa Rican side. It is further contended, on the basis of an affidavit[81], that the registration of departure at the end of a journey will help in making sure that no one has unlawfully entered the Indio Maíz Reserve.

18. According to Nicaragua, stopping and registering makes it possible to control immigration, to issue tourist cards and to ascertain the fulfillment of visa requirements[82]. These requirements are allegedly waived for "local" residents and boatmen, except for the duty to register. The waiver does not, however, appear to be systematic and seems to depend on the discretion of the official in charge. Finally, much is being made by the other Party of the fact that if Costa Ricans have to obtain a Nicaraguan consular visa, this is based on reciprocity: Costa Rica requires visas from Nicaraguans entering Costa Rican territory[83].

19. Mr. President, Members of the Court, there are several things wrong with these arguments. One really fails to see what this type of obligation brings in terms of environmental protection or, at least, what is achieved by them that could not be accomplished by other, less

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[78] *Ibid.*, 4.61.

[79] *Ibid.*, 4.80.

[80] *Ibid.*, 4.60.

[81] Largaespada affidavit, § 9, RN, Vol. II, Ann. 72.

[82] RN, Vol. I, 4.87, 4.90.

[83] *Ibid.*, 4.91.

radical measures. Thus, intentions of illegal entry and of unlawful occupation of the Indio Maiz Reserve are certainly not carved on the faces of those who stop and register and can only be thwarted *in situ*. Criminals do not turn up at Nicaraguan army posts prior to perpetrating crimes in that country. To control every child travelling to and from school on each and every day borders on obsession, and it is difficult to see how this could *prevent* accidents. Stopping as a device to control immigration and visa requirements is based on the misapprehension that individuals travelling on the San Juan on board Costa Rican vessels enter Nicaraguan territory in the same way as a tourist does when landing at Managua airport. This is simply not true: such individuals benefit from Costa Rica's right of navigation under Article VI of the 1858 Treaty; and most of them are only transiting without entering Nicaragua with the intention to stay. The position may be different where they subsequently moor on the Nicaraguan side and proceed on land. Another misapprehension is the idea that if Costa Rica herself requires visas and collects fees from tourists entering her territory, Nicaragua may do the same in respect of individuals sailing on the San Juan River on ships flying the Costa Rican flag. The defendant State seems to forget that it enjoys no perpetual treaty right of navigation on Costa Rica's national waterways, whereas Costa Rica does have such a right on the San Juan River. Finally, the measures in question are most cumbersome and have the practical effect of rendering near impossible the exercise of Costa Rica's conventionally granted rights of navigation.

20. The inevitable conclusion is that the requirements of stopping and registering do not have much of a preventive effect. Their main virtue consists in making navigation more difficult. They cannot, therefore, be regarded as either "reasonable" or lawful. By contrast, patrolling the river more often would be reasonable, lawful and effective.

Requirement of departure clearance certificates

21. I now come, Mr. President, Members of the Court to the requirement of departure clearance certificates. According to the defendant State, departure clearance certificates, which I shall refer to as DCCs, are required from all those planning to sail on the San Juan River. The issuance of such documents is said to be contingent on an inspection conducted, *before every journey*, by a Nicaraguan border post, that inspection seeming to be intended to disclose the

identity of the passengers and the nature of the cargo carried. Further objectives are, according to Nicaragua: the enforcement of customs regulations, the prevention of the carrying of illegal cargo such as drugs and other items determined *ad hoc* by the Nicaraguan authorities, of illicit traffic of persons, of navigation by unseaworthy boats, of unlawful discharge of pollutants, of the unlawful removal of animals and plants, of crimes and threats against border security, and of illegal entering of the Indio Maíz Reserve; and, for tourist boats, the verification that these dangerous individuals do not carry weapons, explosives or other flammable substances[84].

22. According to Nicaragua, the requirement reported here was accepted by Costa Rica herself at a binational meeting held in 1997[85], where it had allegedly been agreed that all ships travelling on the San Juan River should obtain DCCs and subsequently report to *all* Nicaraguan army posts in the course of their journey[86]. But the Final Minutes of the 1997 binational meeting only refer to drug trafficking. The delegation of Costa Rica to the meeting had stressed, *in that particular matter*, the need for greater presence of the authorities, and Nicaragua had agreed to make an effort to establish posts at determined sites to intensify the fight against this particular crime. "With respect to the movement of vessels," the Minutes continue, "it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case, the posts at San Juan del Norte, San Carlos and Sarapiquí". This passage does not refer to the practice of DCCs as conceived of today by Nicaragua, but exclusively to a practice to fight drug traffic; and it only means that DCCs should be obtained by vessels *from their respective countries*.

23. In reality, the objective of these certificates is not one of promoting safety but one of levying a tax. One wonders, moreover, considering Costa Rica's right of navigation secured by the 1858 Treaty, whether Nicaragua could not and should not simply accept and recognize DCCs delivered by Costa Rica to Costa Rican boats. What is more, a fee of US$10 is currently being charged for every certificate and every journey. This is unacceptable on two grounds: first, such a fee is not authorized by the 1858 Treaty, the Cleveland Award, or anything else; second, it

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[84] Sanchez affidavit, § 9, RN., Vol. II, Ann. 77.

[85] RN, Vol. I, 4.75.

[86] RN, Vol. II, Ann. 4.

amounts to charging a tax for the exercise of a conventionally guaranteed right of navigation. Costa Rica's right of navigation is of an absolute character, and the fact that Nicaraguans also have to obtain such a certificate[87] is irrelevant. Nicaragua further argues that Costa Rica too requires DCCs for the use of her internal watercourses; certificates which, incidentally, are delivered free of cost. This is both untrue and immaterial: on such waterways navigation is possible, not on the basis of an internationally guaranteed right of navigation, as is the case for Costa Rica regarding the San Juan River, but at the discretion of the Costa Rican authorities; and the situation is, of course, exactly the same for Costa Rican boats desirous of using Nicaragua's *internal* waterways. The San Juan River is, not, however, an internal waterway of Nicaragua but an international river on which Costa Rican ships enjoy the right of free navigation.

24. In view of these arguments, the requirement of Departure Clearance Certificates in their present form is "unreasonable" and unlawful, as it purports to transform a conventionally guaranteed right of free navigation into one the exercise of which is entirely placed into Nicaragua's hands.

(d) ***Prohibition of travelling by night***

25. Now, if you will, a few words about the prohibition of travelling by night. Nicaragua unilaterally prohibits navigation on the San Juan by night and explains this measure at some length[88]. Poaching is singled out as being the greatest danger of nocturnal navigation[89]. Also, Colonel Sánchez asserts, navigation at night is prohibited "since navigation after dark is extremely dangerous and unwise". Brigadier General Membreño adds that the river "is treacherous to navigate, since there are no lights, and fallen logs and sand bars, invisible in the dark, are prevalent, as are crocodiles".

26. The cloak of darkness also favours unsavoury activities such as hunting, poaching, fishing and environmental depredation, as well as illegal occupation. This is why Nicaragua has pronounced a unilateral ban on navigation by night, an additional justification *appearing* to be that

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[87] García affidavit, § 4, *ibid.*, Ann. 70; RN., Vol. I, 4.73.

[88] RN, Vol. I, 4.65-4.66.

[89] Sánchez affidavit, § 6, RN., Vol. II, Ann. 77; Membreño affidavit, § 9, *ibid.*, Ann. 73.

the prohibition applies to Nicaraguans and Costa Ricans alike. These reasons raise a long series of objections:

(i) the 1858 Treaty and the related texts make no mention of the possibility of any such limitation. It is true that Costa Rica herself, in the presentation made by her to President Cleveland in 1887, recognized that navigation on the San Juan River "encounters many obstacles, not only on account of its shallowness at certain places, but also owing to its rapids and other dangers"[90]. This statement, however, relates to navigation on the river generally and not to travelling by night; moreover, the Cleveland Award is silent on the issue.

(ii) In fact, shallowness and rapids characterize the upper part of the San Juan. Further down, particularly after having received the waters of the San Carlos, the San Juan becomes a large waterway allowing for navigation around the clock.

(iii) As conceded by Nicaragua herself, the preventive effects of the measure are not particularly encouraging, and most of the events the prohibition is intended to avert could also be prevented during the day. Intrusions into reserves, for instance, could be handled most effectively by arresting and expelling the individuals concerned by daylight.

(iv) Another argument made by the defendant State is that the prohibition of navigation by night decreed by it applies across the board and includes its own nationals. In this connection too, it may be recalled that the perpetual right of free navigation, stipulated in 1858, is of an absolute character, which means that Costa Rica's right exists independently of whether Nicaraguans have such a right too. More importantly, the argument is misleading. A timetable entitled "Regional Lake Services"[91] reveals that the National Port Enterprise of Nicaragua runs a service from Granada to San Carlos which leaves Granada at 2.00 p.m. on Mondays and Thursdays, takes 16 hours and returns to Granada on Tuesdays and Fridays at 2.00 p.m. It seems obvious that part of that service is operated by night, that is, after 5.00 p.m., on the San Juan River. Thus, some navigators seem more equal than others. And, while there are dangers for some, they do not appear to exist for others.

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[90] RN, Vol. II, Ann. 5, p. 33.

[91] To be found on the website of the Empresa Portuaria Nacional de Nicaragua, www.epn.com.ni.

(v) Lastly one should examine whether Nicaragua's unilateral measures, when confronted with the perpetual right of free navigation of Costa Rica, are reasonably proportional to the objective they seek to achieve. This raises the further question of whether that objective could not be met by other means. The answer will have to be in the affirmative: the objective could be reached by prescribing that boats travelling at night shall carry lights and that dangerous places should be marked by lights as well — this is a standard requirement in rivers. It would seem that the display of a minimum of co-operation between the two sides could readily produce a viable régime of navigation by night.

(e) *Duty to fly the Nicaraguan flag*

27. Now, the last type of measure, the duty to fly the Nicaraguan flag. According to the defendant State, "[t]he requirement to fly her flag during navigation on her waters, including the San Juan, is an attribute of Nicaragua's sovereignty, and is a matter of international custom and practice"[92].

28. Nicaragua alleges that that requirement is limited to larger foreign vessels having masts or turrets at the stern[93]; she further contends that ships may also, in addition, show the Costa Rican flag. Flying the Nicaraguan flag is described as "a gesture of respect for the sovereignty of the host State"[94]. Nicaragua "finds it disturbing that Costa Rica objects to this reasonable and non-burdensome requirement"[95]. I find it disturbing, for my part, that Nicaragua tends to speak of "courtesy" when *rights* are at stake, such as Costa Rica's rights of navigation; and that, conversely, she refers to "custom" wherever international practice shows that mere *courtesy* is involved, as when it comes to showing the flag of the State in whose waters a foreign vessel moves.

29. Under general *international law*, and in situations where there are conventionally guaranteed rights of navigation, there is unquestionably a rule to the effect that in foreign waters

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[92] RN, Vol. I, 4.93.

[93] *Ibid.*, 4.94. See also RN, Vol. II, Ann. 48.

[94] RN, Vol. I, 4.93.

[95] *Ibid.*

ships must fly their *national* flag. The territorial State — Nicaragua in our case — certainly has an interest in being able to identify the foreign ships navigating in waters over which it exercises its sovereignty. That would appear to be the *legal* rule, and a sensible and useful one at that.

30. There may also be a practice, inspired by *international courtesy*, to show the flag of the country whose waters are being navigated in. This is a ceremonial element rather than an international obligation.

31. In addition, no legislation other than an "Action Plan" of its army[96] has been submitted by the defendant State to justify the requirement for foreign vessels to fly the flag of Nicaragua when navigating in Nicaraguan maritime waters, nor, *a fortiori*, a requirement to do so when sailing in waterways such as San Juan River.

(f) *Conclusion*

32. Mr. President, Members of the Court, my conclusion on the specific measures taken by the defendant State to regulate navigation on the San Juan River is that they are inconvenient, unreasonable and unlawful, since their combined effect has led to transforming the navigation régime established in 1858 into an obstacle course.

3. General conclusions

33. Mr. President, Members of the Court, the general conclusions which may be drawn from my intervention would seem to be the following.

- First, according to *Nicaragua*, the restrictions imposed by her on navigational activities on the San Juan River are "reasonable". For *Costa Rica*, they are both unreasonable and unlawful.
- Second, it has been pointed out time and again that there is no hierarchy between Nicaragua's sovereignty over the river and Costa Rica's perpetual right of free navigation. That right is intended to be real and effective, and one that cannot be regulated out of existence by Nicaragua. It is, furthermore, of an absolute character and will endure even if it ceases to exist for Nicaraguans themselves — I hope that will never be the case, of course. It cannot, in other words, be made to disappear by refusing rights of navigation to Nicaragua's own citizens.

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[96] RN, Vol. II, Ann. 48.

— Third, the measures taken and the regulations enacted by Nicaragua, invoking her sovereignty, might be unobjectionable for an exclusively internal waterway. Thus, they would not be contrary to international law, for example, if they were enacted by Nicaragua, in Nicaraguan internal waterways, for Costa Rican nationals and/or third-State users. This is due to the fact that such individuals do not benefit from an internationally guaranteed right of navigation in those waters.

— Fourth, the measures and regulations in question are unreasonable and unlawful in that they turn Costa Rica's conventionally guaranteed perpetual right of free navigation into a mere privilege which Nicaragua can, at any moment, limit or take away by unilateral action.

— Fifthly and finally, for Costa Rica, the situation created by the gradual erosion of the exercise of her right is not only unlawful and unreasonable, it is also highly cumbersome and impractical because, instead of facilitating relations between two neighbouring States, it makes them more difficult. This is regrettable.

Mr. President, Members of the Court, I thank you for your attention and your patience and should like you to invite Professor Kohen to take the floor.

The PRESIDENT: Thank you, Professor Caflisch, for your statement. I now invite Professor Kohen to take the floor.

M. KOHEN :

LES VIOLATIONS NICARAGUAYENNES DU DROIT PERPÉTUEL DE LIBRE NAVIGATION AUX FINS DU COMMERCE

1. Monsieur le président, Messieurs les juges, l'*objet* de ma première plaidoirie ce matin est la *violation* par le Nicaragua du droit perpétuel de libre navigation du Costa Rica aux fins du commerce.

2. Ma tâche se voit facilitée, vu que le Nicaragua ne nie pas les faits qui constituent autant de violations du droit en question. L'Etat défendeur se contente d'avancer comme justification principale l'interprétation de l'article VI que nous avons repoussée hier.

3. En réalité, le Nicaragua ne respecte même pas la navigation costa-ricienne «avec des articles de commerce de marchandises», pour utiliser sa terminologie, en lui imposant des obstacles divers et variés allant jusqu'à la saisie des bateaux ou des biens qu'ils contiennent[97].

4. Une deuxième et tardive justification avancée par la duplique, à savoir son droit d'imposer une réglementation jugée raisonnable, vient d'être réfutée par Lucius Caflisch il y a quelques instants. Arrivent enfin en troisième lieu les prétendues justifications basées sur des considérations de sécurité et de protection de l'environnement.

5. Dans un premier temps, j'aborderai les violations nicaraguayennes. J'examinerai dans un second temps les prétendues justifications exposées en dernier lieu par le Nicaragua.

A. Les violations commises par le Nicaragua sont amplement prouvées

6. Les violations actuelles du droit costa-ricien de libre navigation aux fins du commerce trouvent leur racine à l'époque de la guerre civile qui sévissait au Nicaragua. L'armée sandiniste a commencé à imposer des restrictions à la navigation à ce moment-là.

7. En 1982, cette armée interdit la navigation à la compagnie touristique costa-ricienne *Swiss Travel Services*[98]. Face aux protestations du Costa Rica[99], le Nicaragua a reconnu que les mesures de ses autorités locales n'étaient pas conformes au traité et qu'elles seraient abrogées[100].

8. Au cours de la même période le Nicaragua a commencé à exiger des bateaux costa-riciens de s'arrêter à leurs postes frontière sur la rive nicaraguayenne et de payer un «droit d'appareillage». Suite à des protestations costa-riciennes[101], cette pratique fut abandonnée en 1983[102], pour être reprise en 2001, comme je l'expliquerai dans un instant.

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[97] Mémoire du Costa Rica (MCR), par. 5.142-5.143 ; Réplique du Costa Rica (RCR), par. 4.56-4.58 ; RCR, vol. 2, annexe 50.

[98] Lettres adressées par la direction de *Swiss Travel Services* au ministère de la sécurité publique et au ministère des affaires étrangères du Costa Rica, MCR, vol. 6, annexes 223, 224 et 225.

[99] Notes adressées le 8 juin 1982, le 16 juillet 1982 et le 20 juillet 1982 par le ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, au chargé d'affaires du Nicaragua au Costa Rica, Oscar Ramón Téllez, MCR, vol. 3, annexes 41, 42, 43.

[100] Note adressée le 2 août 1982 par le chargé d'affaires du Nicaragua au Costa Rica, Óscar Ramón Téllez, au ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, MCR, vol. 3, annexe 44 (dossier de plaidoiries, onglet n° 38.

[101] Voir la note adressée le 16 juillet 1982 par le ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, au chargé d'affaires du Nicaragua au Costa Rica, Oscar Ramón Téllez, MCR, vol. 3, annexe 42.

[102] MCR, par. 3.13-3.14.

9. Il est intéressant de comparer la position du Gouvernement nicaraguayen en 1982 et celle qu'il adopte aujourd'hui. Le ministre nicaraguayen des affaires étrangères de l'époque expliquait la situation de la manière suivante :

> «les Costariciens ont un droit de navigation sur le San Juan conformément au traité Cañas-Jerez. Toutefois, du fait de la présence de bandes contre-révolutionnaires dans la zone, nous avons demandé aux Costa-riciens de nous notifier quand ils vont par le San Juan».

Et il a ajouté :

> «ce n'est pas que nous voulons ignorer leur droit de naviguer le fleuve, mais simplement nous voulons qu'ils nous le notifient, comme le font les Honduriens quand ils naviguent le fleuve Coco, afin d'éviter des incidents comme celui de mardi dernier»[103].

10. Lors de ce mardi, dont fait mention le ministre, l'armée sandiniste avait ouvert le feu sur un navire costa-ricien transportant du personnel du ministère de la santé. La notification — *pas la permission* — était requise à l'époque par le Nicaragua, se fondant sur la situation exceptionnelle générée par le conflit armé interne.

11. La guerre civile nicaraguayenne est terminée depuis longtemps, fort heureusement. Mais les restrictions ont fait leur réapparition en 1994. Cette fois-ci elles ne se limitent pas à l'exigence de notification.

12. Ces restrictions sont toutes incompatibles avec le droit perpétuel de libre navigation du Costa Rica. Je vais maintenant vous les exposer très brièvement.

a) Les restrictions incompatibles avec le droit de *libre* navigation

i) Les cartes touristiques

13. Depuis mars 1994, un montant de 5 dollars américains est perçu sous la forme de «carte touristique» de chaque passager naviguant sur un bateau costa-ricien[104]. Suite aux protestations du

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[103] Traduction en anglais: «Costa Ricans have a right of navigation on the San Juan according to the Cañas-Jerez Treaty. But because in that area there are counterrevolutionary bands, we have asked the Costa Ricans to notify when they are going to cross the San Juan». He added that: «it is not that we want to ignore their right to navigate the river, but simply that they notify us, as the Hondurans do when they navigate on the Coco River, so as to avoid accidents like the one of the previous Tuesday.» (MCR, par. 5.10 ; *La Nación*, San José, 8 novembre 1980, MCR, vol. 5, annexe 111). (Dossier de plaidoiries, onglet n° 43.)

[104] MCR, par. 5.107-5.108 ; RCR, par. 4.09-4.11.

Costa Rica[105], le Nicaragua a cessé d'exiger cette carte des ressortissants costa-riciens, mais a continué à l'imposer aux ressortissants des Etats tiers[106].

ii) Les «droits d'appareillage»

14. A partir de mars 2001, un paiement de 25 dollars américains est exigé par bateau costa-ricien à titre de «droit d'appareillage». Malgré les protestations répétées du Costa Rica[107], ces mesures continuent à être appliquées.

15. Le montant de cette taxe s'élève actuellement à 10 dollars américains par bateau pour chaque course simple[108]. En fait, il varie au gré de circonstances que le Nicaragua n'a pas jugées utile d'expliquer. Vous voyez à l'écran deux reçus datés du même jour et correspondant au même bateau, l'un de *5* dollars pour la course aller *Sarapiqui-San Juan del Norte* et l'autre de *10* dollars pour le retour *San Juan del Norte-Sarapiqui*.

16. Cette taxe est appelée «zarpe internacional», c'est-à-dire «appareillage international», et elle est perçue des navires costa-riciens, quelle que soit leur destination[109]. Appareillage «international» : difficile alors pour le Nicaragua d'affirmer — comme il le fait[110] — que cette mesure s'applique également aux bateaux nicaraguayens navigant le San Juan.

iii) La taxe d'immigration

17. Depuis mars 2001, 5 dollars sont exigés par personne comme «taxe d'immigration» pour l'entrée et la sortie du territoire nicaraguayen. En 2002, la «taxe d'immigration» a été augmentée à deux reprises. Depuis lors, tous les passagers des navires costa-riciens naviguant sur le San Juan sont obligés de payer 9 dollars, même lorsqu'ils se déplacent entre deux points du territoire du

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[105] Note adressée le 15 mars 1994 par le ministre des affaires étrangères du Costa Rica, Bernd Niehaus Quesada à l'Ambassadeur du Nicaragua au Costa Rica, Alfonso Robelo, contre-mémoire du Nicaragua (CMN), vol. II, annexe 41 ; Note adressée le 9 mai 2001 par le ministre des affaires étrangères du Costa Rica, Roberto Rojas López au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 71. *La República*, San José, 5 mars 1994, MCR, vol. 5, annexe 123.

[106] *La Nación*, San José, 13 avril 1994, MCR, vol. 5, annexe 129.

[107] Note datée 18 avril 2001 du ministre adjoint des affaires étrangères du Costa Rica, Elayne Whyte au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 70, note datée 9 mai 2001 du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 71.

[108] RCR, par. 4.07.

[109] Dossier de plaidoiries, onglet n° 41.

[110] Duplique du Nicaragua (DN), par. 4.25.

Costa Rica, 4 dollars à titre de «despacho migratorio», des opérations de migration, d'entrée et de sortie du Nicaragua[111], et 5 dollars perçus à titre de — je lis encore en espagnol — «permiso de tránsito en los punto[s] fronterizo[s]», «permis de transit par des points frontaliers»[112]. En clair, non seulement le Nicaragua impose illicitement à tout navire costa-ricien l'obligation de s'arrêter à chaque poste frontalier nicaraguayen, mais en plus, il exige de toute personne qui circule — batelier ou passager — de payer pour cela !

b) Les restrictions incompatibles avec le droit *perpétuel* de *libre* navigation

i) Interdiction générale de naviguer de 17 h 30 à 6 heures

18. M. Calfisch s'est déjà référé à l'exigence des visas et à la pratique systématique de fouilles, il s'est également référé à l'obligation de hisser le pavillon nicaraguayen, il a également parlé de l'interdiction générale de naviguer de 17 h 30 et 6 heures et j'ajouterai qu'il s'agit d'une violation flagrante d'un droit qui est qualifié de «perpétuel» — donc permanent, ininterrompu — et «libre»[113]. C'est un étrange droit perpétuel que celui qui cesse tous les jours et qui ne peut être exercé que moins de la moitié de chaque jour.

ii) Interdictions spécifiques

19. La navigation costa-ricienne a été interdite lors de certaines journées spécifiques, comme par exemple le 3 août 1998 entre 9 heures et 17 heures — c'est-à-dire pendant la journée —, sous prétexte d'une visite du président nicaraguayen[114]. Même la visite du plus haut fonctionnaire public ne justifie l'interruption durant pratiquement toute la journée de l'exercice d'un droit conventionnel de navigation tout au long des 141 kilomètres du fleuve «où la navigation est commune». Monsieur le président, je ne sais pas si vous souhaitez que l'on fasse une pause à ce moment là, ou si vous le préférez, je peux continuer encore une dizaine de minutes.

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[111] Dossier de plaidoiries, onglet n° 39.

[112] Dossier de plaidoiries, onglet n° 40.

[113] MCR, par. 5.68-5.77 ; RCR, par. 4.19-4.21.

[114] MCR, par. 5.73.

The PRESIDENT: Thank you, Professor Kohen. I think it is a good suggestion, so we'll have a coffee break for about 10 minutes. Thank you.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. Professor Kohen, please continue.

Mr. KOHEN: Thank you, Mr. President.

B. Aucune justification invoquée par le Nicaragua n'est fondée

20. Le Nicaragua prétend n'avoir jamais empêché les navires costa-riciens transportant des passagers d'entrer ou de naviguer sur le San Juan, sauf pendant 1982[115]. Le problème qui se pose ici sont les conditions contraires au traité que le Nicaragua impose à cette navigation, qui la restreignent significativement et qui privent le droit costa-ricien de toute substance.

a) Aucun pouvoir réglementaire ne peut dénaturer le droit perpétuel de libre navigation

21. Lucius Caflisch s'est référé, il y a quelques instants, à la règlementation de la navigation sur le San Juan et a démontré qu'aucun pouvoir règlementaire ne doit dénaturer le droit perpétuel de libre navigation.

22. Le Nicaragua prétend que les mesures qu'il a prises s'appliquent sans discrimination à tous les navires, y compris aux navires nicaraguayens[116] ou encore à tout étranger entrant dans son territoire[117]. Mon professeur et aujourd'hui collègue et ami a déjà démonté cette justification.

22. Nous l'avons précédemment vu, ce n'est pas même du traitement national dont il est question. La réalité est que le zèle nicaraguayen est unidirectionnel : toutes ces entraves s'appliquent à la seule partie du fleuve San Juan où la navigation est commune et, à l'exception de l'horaire de navigation, avec les commentaires que M. Calfisch a faits, uniquement aux navires costa-riciens.

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[115] DN, par. 4.30.

[116] DN, par. 4.25.

[117] DN, par. 4.87.

23. Selon le Nicaragua, l'ensemble de ces mesures constituerait tout au plus des inconvénients *de minimis* dont la nature «raisonnable» et «nécessaire» contrebalancerait ces intrusions mineures[118]. Parler de simples «inconvénients» semble être une plaisanterie. Prises isolément ou dans leur intégralité, ces exigences, imposent en fait de lourdes conditions supplémentaires au droit de libre navigation aux fins du commerce. Elles visent à restreindre l'exercice de ce droit et, de ce fait, sont illicites.

24. En imposant des conditions supplémentaires à la navigation qui ne résultent pas du traité, le Nicaragua entrave l'exercice du droit costa-ricien découlant de l'article VI et agit donc de manière illicite. Ce que votre Cour a affirmé dans un autre contexte est ici parfaitement applicable. Je cite : «La disposition perdrait sa signification et sa valeur si d'autres conditions, étrangères à celles qui sont prescrites, pouvaient être exigées.» (*Conditions de l'admission d'un Etat comme Membre des Nations Unies (article 4 de la Charte), avis consultatif, 1948, C.I.J. Recueil 1947-1948*, p. 62.)

b) Le Costa Rica n'a jamais consenti aux «règlementations» nicaraguayennes

25. Conscients de la faiblesse de leurs arguments, nos amis de l'autre côté de la barre font valoir que le Costa Rica aurait accepté le prétendu pouvoir de réglementation à l'égard de sa navigation «touristique». Ils mentionnent à ce propos le mémorandum d'entente signé le 5 juin 1994 entre les ministres du tourisme des deux pays[119].

26. Déformant le texte, le Nicaragua fait valoir que, selon ce mémorandum, le Costa Rica aurait l'obligation d'acheter au Nicaragua des cartes touristiques et d'enregistrer les entreprises touristiques.

27. En réalité, le texte du mémorandum indique que les opérateurs de tourisme devraient se faire enregistrer et obtenir des cartes touristiques auprès des autorités de leurs pays respectifs[120]. A aucun moment, il ne mentionne une quelconque obligation pour les opérateurs costa-riciens d'obtenir des cartes touristiques du Nicaragua, ni de se faire inscrire sur le registre nicaraguayen.

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[118] DN, par. 4.34.

[119] CMN, par. 1.3.41.

[120] Voir le texte du mémorandum, MCR, vol. 2, annexe 26.

Les touristes qui transitent par le San Juan se déplacent d'un point à un autre du territoire costa-ricien : ils ne font aucun séjour touristique au Nicaragua.

c) *Les arguments de la sécurité de la navigation, de la prévention du crime et du contrôle des frontières ne permettent pas de limiter le droit perpétuel de libre navigation*

28. De manière extrêmement tardive, le Nicaragua est allé puiser des prétextes supplémentaires pour justifier son comportement illicite dans de prétendus besoins liés à la prévention du crime[121], à la sécurité de la navigation[122] et au contrôle des frontières[123].

29. La duplique nous explique que le fait que des soldats de l'armée nicaraguayenne arrêtent quotidiennement les navires transportant des enfants vers des écoles costa-riciennes vise à protéger ceux-ci des crocodiles[124]. Je sais bien que l'armée nicaraguayenne est puissante et aguerrie, mais j'ignorais sa puissance dissuasive à l'égard des crocodiles. Et je suppose que le but de ces mêmes militaires, qui arrêtent tous les jours ces enfants pour les enregistrer, est de vérifier si tout le monde est présent et, donc, si leur pouvoir dissuasif vis-à-vis des crocodiles reste intact.

30. En revanche, je n'ai trouvé aucune explication au fait que les sacs de ces mêmes écoliers contenant leurs fournitures scolaires soient soigneusement examinés par l'armée du Nicaragua[125].

31. Et soit dit en passant : les coupures de presse annexées à la duplique se référant à des attaques de crocodiles subies par des enfants en train de se baigner — et non de naviguer — ne concernent aucunement le San Juan[126].

32. La duplique consacre de longs passages à de prétendues actions de braconnage[127], de destruction des forêts[128], de pollution du fleuve[129] et d'autres méfaits qui, naturellement, ont tous leur origine sur la rive costa-ricienne du fleuve. Encore une autre bizarrerie de cette procédure : comment se fait-il que des actes d'une pareille gravité aient pu passer inaperçus au Nicaragua lors

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[121] DN, par. 4.69-4.77.

[122] DN, par. 4.78-4.85.

[123] DN, par. 4.86-4.91.

[124] DN, par. 4.80.

[125] Déclaration sous serment de Diane Gómez Bustos, 16 février 2006, MCR, vol. 4, annexe 101.

[126] DN, vol. II, annexes 25 et 26.

[127] DN, par. 4.56-4.59.

[128] DN, par. 4.53-4.55.

[129] DN, par. 4.48.

de la rédaction du contre-mémoire ? Comment se fait-il qu'aucun résident costa-ricien, pas un seul, n'ait été jugé et condamné pour de tels actes ? Encore une fois, ces allégations ne sont étayées par aucune preuve concluante.

33. Quoi qu'il en soit, il s'agit là d'une pure diversion. Revenons au vrai sujet de cette affaire. Le traité Cañas-Jerez est clair[130], le Nicaragua lui-même l'a rappelé devant le président Cleveland : le droit costa-ricien de libre navigation ne peut pas être restreint même face au plus grave danger à la sécurité du Nicaragua, à savoir une situation de guerre[131]. Oui, Monsieur le président, conformément au traité, même en cas d'hostilités entre les deux pays, le droit costa-ricien de libre navigation aux fins du commerce doit être respecté. Cela suffit pour apprécier à leur juste valeur les arguments nicaraguayens relatifs aux restrictions à la navigation costa-ricienne fondés sur la sécurité ou sur la prévention du crime.

34. Enfin j'ajouterai que, conformément au traité et à son interprétation par le président Cleveland, il appartient au Costa Rica, et non au Nicaragua, de s'assurer que ses navires et leur navigation soient sûres. Passons vite à l'environnement.

d) *L'excuse «écologique» est un autre argument de dernière minute totalement infondé*

35. A nouveau très tardivement, le Nicaragua s'est découvert une soudaine passion écologique dans sa duplique. Jamais une seule protestation nicaraguayenne n'a été émise contre le Costa Rica en raison d'une quelconque atteinte à l'environnement du fait de sa navigation sur le San Juan. Pas un mot dans le contre-mémoire non plus. Mais voilà que la duplique s'adonne à de longs développements, visant à démontrer que l'obligation de s'arrêter à chaque poste frontière, de se faire enregistrer et d'obtenir un «droit d'appareillage», ainsi que la prohibition de naviguer durant la nuit répondent à l'exigence de protéger l'environnement[132].

36. Imaginez-vous les dommages à l'environnement que des canoës et autres bateaux utilisés par les Costa-riciens peuvent causer, y compris aux espèces ichtyologiques. Je dis bien «imaginer», car le Nicaragua n'a évidemment pas produit la moindre preuve pour démontrer que la

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[130] Article IX.

[131] Texte anglais original: «Even if war is flagrant, her commerce on this river could not be interfered with.» MCR, vol. 6, annexe 208, p. 844 (dossier de plaidoiries, onglet n° 44).

[132] DN, par. 4.61-4.66.

navigation costa-ricienne porte atteinte à l'environnement du fleuve ou qu'elle est même en mesure de le faire.

37. Imaginez maintenant ce que signifierait pour les espèces et pour l'environnement dont le Nicaragua se soucie tant, que les travaux de dragage du San Juan projetés par la Partie adverse deviennent une réalité[133]. Imaginons-nous encore qu'un jour le Nicaragua accomplisse son rêve historique : la construction du canal interocéanique à travers le San Juan et le lac Nicaragua. Que resterait-il de cette superbe réserve naturelle nicaraguayenne où personne ne peut s'installer, où pas un seul arbre ne peut être coupé et où la pêche d'un seul poisson est interdite ? Tout cela, Monsieur le président, ressemble à un argument de dernière minute d'une partie qui ne sait plus que dire pour essayer de justifier une conduite manifestement illicite.

C. Conclusion

38. Monsieur le président, Messieurs les juges, je viens d'illustrer les violations au droit perpétuel du Costa Rica de libre navigation aux fins du commerce que M. Sergio Ugalde a énumérées hier[134] et l'absence de toute justification valide au comportement du Nicaragua.

39. Je vous remercie de votre attention Monsieur le président et vous prie de donner la parole à Mme Kate Parlett, membre du barreau d'Australie.

The PRESIDENT: I thank Professor Kohen for his statement and I invite Ms Parlett to take the floor.

Ms PARLETT:

NICARAGUA'S BREACHES OF THE RIGHT OF NAVIGATION OF PUBLIC VESSELS

Introduction

1. Mr. President, Members of the Court, it is a great honour to make my first appearance before you on behalf of the Government of Costa Rica.

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[133] CMN, par. 7.2.6 ; DN, par. 6.5-6.16.

[134] CR 2009/2, p. 29-30, par. 22 (Ugalde).

2. It is my task to outline Nicaragua's breaches of Costa Rica's rights of navigation with public vessels. The evidence shows that Nicaragua has engaged in a series of violations of Costa Rica's rights, and that these have intensified since Costa Rica filed the present Application.

3. In the first part of my presentation I will show that Nicaragua has breached Costa Rica's rights by prohibiting navigation with public vessels. In 1998 Nicaragua prohibited navigation by Costa Rican police vessels, and subsequently it has prevented other public vessels and government officials from navigating in order to provide essential services to the local population, including health, education and security.

4. In the second part I will show that Nicaragua has breached Costa Rica's rights by requiring Costa Ricans to obtain a visa. This was a retaliatory measure imposed after Costa Rica filed the Application in the present case and it has had detrimental consequences for the provision of health and social welfare services to the local communities along the Costa Rican bank of the river, many of which cannot be reached by roads accessible throughout the seasons.

5. Nicaragua has failed to respond to the evidence of breaches which Costa Rica has presented in its written pleadings. It has merely denied the existence of Costa Rica's treaty rights. Nicaragua also alleges that Costa Rica recognizes a need to obtain permission to navigate on the San Juan. This allegation appears to be based on a Nicaraguan policy of compelling Costa Rican individuals and institutions to request written permission to navigate on the San Juan, a policy which appears to have been intended to provide belated documentary support for these allegations.

Nicaragua's prohibition of navigation with public vessels

6. I now come to my first point: that Nicaragua has breached Costa Rica's rights by unilaterally prohibiting navigation with public vessels. As Professor Crawford explained, public vessels enjoy the perpetual right of free navigation under Article VI of the 1858 Treaty. This includes navigation by officials providing essential services to the communities on the Costa Rican bank.

7. On 14 July 1998 Nicaragua unilaterally prohibited navigation by Costa Rican police vessels[135]. Prior to this date, police had regularly navigated on the river, in uniform and carrying their normal arms, and had even carried out joint operations with the Nicaraguan army[136].

8. Nicaragua's prohibition of police navigation breaches Costa Rica's rights in four separate ways. First, the prohibition is a breach of the treaty right to protect Costa Rica's navigation for purposes of commerce. This right includes navigation with armed personnel, in accordance with the 1858 Treaty and the Cleveland Award. Second, it violates Costa Rica's treaty right to navigate for purposes of commerce, which includes the use of the river as a means of communication. This covers navigation for the purpose of resupplying and relieving personnel at border posts and for the purpose of providing essential health, education and security services to the local population. Third, it prevents Costa Rica from exercising its right to safeguard the San Juan as established in Article IV of the 1858 Treaty. Fourth, it hinders Costa Rica from complying with its obligation to defend the common Bay of San Juan del Norte. Since the bay is effectively closed to the ocean, the San Juan is the only means by which Costa Rica may access the bay.

9. Nicaragua's prohibition of navigation has not only prevented police vessels from navigating, but has also prevented other public vessels and officials from navigating on the San Juan in exercise of Costa Rica's treaty rights of navigation. In its written pleadings, Costa Rica has documented three examples:

— on 4 August 1998, officials from the Nicaraguan army prevented judicial officers from navigating on the San Juan in a public vessel, on a journey to Fàtima de Sarapiquí to investigate the death of an 11-month-old child[137];

— in September 1998 Nicaraguan officials prevented Costa Rican technicians from the Programme of the Eradication of Screwworms from Cattle from navigating to implement the programme in the Costa Rican border zone[138]; and

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[135] MCR, Anns. 240, 131, 132.

[136] MCR, Anns. 88, 89, 90, 94, 103 and 105.

[137] MCR, Ann. 150; MCR, para. 5.97; RCR, para. 4.25.

[138] MCR, Anns. 52 and 53; MCR, para. 5.98; RCR, para. 4.25.

— on 26 September 2000, two officials from the Costa Rican Bureau of Judicial Investigation and a police officer were prevented from navigating to investigate a cattle robbery that had taken place in the Caño Río Jardín area[139].

10. Nicaragua's prohibition has adversely affected the capacity of Costa Rican police to combat trans-border crime[140]. Additionally, it has resulted in a reduction of the level of human security and an increase in illegal immigrants[141]. There are particular concerns about drug trafficking[142] and arms trafficking[143] in the region. From Costa Rica's border posts it may take a long time to reach local communities; in some cases it is impossible to reach remote villages during the wet season[144].

11. Nicaragua claims that Costa Rica has adequate roads and landing strips and aircraft to deliver these services by land, and consequently has no need to navigate on the San Juan[145]. These allegations are not true — and constant repetition does not make them true. There are no adequate roads in the region. But even if there were, Costa Rica has treaty-established rights of navigation on the San Juan, and it is no answer to say that there is no need for Costa Rica to exercise those rights.

12. Nicaragua's prohibition of police navigation, and in particular of police navigating to resupply and relieve personnel at its border posts, has resulted in the closure of one of Costa Rica's police posts. In 1999 the Costa Rican post at La Cureña had to be closed because it was impossible to access it by land and Nicaragua had prevented access to it by the San Juan River[146]. In consequence there is no border post between Rio San Carlos and Río Sarapiquí. This has had a negative impact on security in the region: residents of the local communities have repeatedly

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[139] MCR, Anns. 166, 167, 168; MCR, para. 5.100; RCR, para. 4.25.

[140] MCR, Anns. 164, 165 and 177.

[141] MCR, Anns. 155, 177 and 164.

[142] MCR, Anns. 154 and 181.

[143] MCR, Ann. 165.

[144] MCR, Ann. 177.

[145] CMN, para. 5.2.9; RN, para. 5.98.

[146] RCR, para. 3.94.

expressed concerns about their personal safety and the level of human security in the region has in fact deteriorated (tab 45 in the judges' folder)[147].

13. Nicaragua's restrictions on the navigation of Costa Rican officials and public vessels resulted in the suspension of the provision of basic health services to riparian communities in November 2005[148]. This has resulted in the loss of primary health care to around 450 people including 200 children[149]. In fact, around 50 per cent of them are Nicaraguan[150].

14. It was in these circumstances that Dr. Ching, Director of the Social Security's Health Area of Puerto Viejo de Sarapiquí, approached the Nicaraguan authorities. Before May 2006, health workers travelled on the San Juan to reach communities located along the bank of the river and they never required permission. But on 10 May 2006, the Nicaraguan military informed health workers that they needed the approval of the Nicaraguan Vice-Consul in Sarapiquí to navigate on the San Juan[151]. Dr. Ching sent a Note to the Vice-Consul in Sarapiquí, "requesting the collaboration" to transit on the San Juan to provide basic health services[152]. The Vice-Consul in Sarapiquí replied that he was not able to grant navigation permits[153]. Dr. Ching then wrote to the Vice-Consul in Ciudad Quesada in similar terms[154]; the Vice-Consul directed her to the Nicaraguan Embassy[155]. When she visited the Nicaraguan Ambassador, she was told that "in order to analyze the request, she had to change the term 'Request for collaboration' to 'Request of Authorization to navigate the San Juan River', otherwise her request would not be processed"[156]. Dr. Ching explains these events in an affidavit annexed to Costa Rica's Reply. In particular, she says that "she wrote the note under the terms demanded by the Ambassador, all done as a result of the urgent state of necessity . . . to safeguard the health and lives of people, particularly of children"

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[147] MCR, paras. 5.123-124; MCR, Anns. 155, 164 and 177.

[148] MCR, Anns. 236, 237, 239, 98, 99 and 100; MCR, para. 5.101; RCR, para. 4.25.

[149] RCR, Ann. 44.

[150] *Ibid.*, p. 268.

[151] *Ibid.*, p. 267.

[152] RCR, Ann. 55, p. 292.

[153] CNS014/05/06, cited in RCR, Ann. 44, p. 267.

[154] RCR, Ann. 55, p. 292.

[155] *Ibid.*

[156] *Ibid.*

in the region[157]. Nicaragua did not respond to Dr. Ching's explanation of these events in its Rejoinder.

15. This is not the only health service to the San Juan border area which has been affected by Nicaragua's prohibition of navigation by public vessels[158]. Before mid-2006, personnel from two agencies overseen by the Costa Rican Ministry of Health navigated on the San Juan twice a month to provide basic health care services and to deliver food, education and other services to communities along the Costa Rican bank of the river. Since the middle of 2006 they have been impeded in navigating; and those restrictions remain in force[159].

16. Another Costa Rican government institution, whose work has been adversely affected by Nicaragua's breaches of Costa Rica's rights, is the Joint Institute for Social Assistance, a social welfare agency. In May 2007 the Institute was compelled to request authorization to navigate on the San Juan to participate in a regional environmental and health fair and to bring financial and other assistance to poor families in the communities of Boca San Carlos and La Cureña[160]. Nicaragua's response purported to limit the places in Costa Rica that those officials could visit[161], that is to say, Nicaragua limited the capacity of Costa Rican authorities to attend places in their own territory at a time of their own choosing.

17. Nicaragua's conduct has also had a detrimental effect on the provision of educational services in the region. In addition to making it extremely difficult for teachers in the region to attend training and meetings[162], government officials have been prevented from assisting in the provision of education to children. Officials from the Joint Institute for Social Assistance were "placed in a position where they needed to request the authorization demanded by the Nicaraguan authorities to navigate the river, as there [was] no other means to reach those communities"[163]. The

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[157] *Ibid.*

[158] RCR, para. 4.31.

[159] See RCR, Ann. 45; RCR, para. 4.32.

[160] RCR, Anns. 46 and 57.

[161] *Ibid.*, Ann. 47.

[162] MCR, para. 5.103; MCR, Ann. 101; RCR, para. 4.25.

[163] RCR, Ann. 56, p. 296.

Institute requested permission on 14 August 2007[164], but Nicaragua never responded and the Institute has been unable to deliver those services[165].

18. Rather than denying the facts Nicaragua embraces them, arguing that it "has consistently required that those from Costa Rica obtain authorization to cross into her territory, whether on the San Juan or elsewhere" and that "Costa Rica has repeatedly recognized this need to obtain permission"[166]. But it claims that since permission is normally given in the result it "does not prohibit Costa Rica from navigating on the San Juan River, with her public vessels, for the purpose of providing medical and other social services to the residents of the riparian communities on Costa Rica's side of the river"[167].

19. The fact remains that Costa Rica has a treaty right of navigation for the purposes of commerce, which includes navigation by government officials to provide essential services to local communities. There is no requirement that these officials obtain prior authorization to navigate on the San Juan; that navigation is a treaty right and not a simple privilege to be granted or refused by Nicaragua. In the circumstances Costa Rica has established that Nicaragua has breached its rights of navigation for public vessels.

Nicaragua's imposition of a requirement that Costa Rican officials obtain a visa

20. I turn to the issue of visas. Before December 2005, no Costa Rican required a consular visa to travel to Nicaragua. As a retaliatory measure taken by the Nicaraguan Government, a requirement that Costa Ricans obtain a consular visa was imposed in December 2005, and it has been maintained to the present day. Revenue from the visa has apparently been directed to finance the costs of Nicaragua's defence in the present case[168].

21. The charge for a consular visa is US$20, plus an additional $5 administrative charge. It is required each and every time any Costa Rican transits on the river, including Costa Rican officials. In addition to the cost, any Costa Rican who needs to travel on the San Juan, including

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[164] RCR, Ann. 49.

[165] RCR, Ann. 56.

[166] CMN, para. 6.2.11.

[167] RN, para. 5.109.

[168] RCR, Ann. 70.

health and social service officials, must attend a Nicaraguan consulate to obtain a visa. In 2006, Nicaragua opened a new consulate in Puerto Viejo de Sarapiquí, but this consulate did not operate regularly and in March 2007 it was closed. In consequence, Costa Ricans who need to transit on the San Juan are forced to travel to either Ciudad Quesada or San José to visit a consulate, for which they inevitably incur additional expenses (tab 46 in the judges' folder).

22. Again Nicaragua does not deny that these charges are imposed on Costa Rica's navigation on the river; nor does it make any statement or produce any evidence in respect of the fact that the requirements are a retaliatory measure in response to Costa Rica's filing of the present case. In these circumstances, it is clear that Nicaragua has breached Costa Rica's perpetual right of free navigation in respect of public vessels.

Nicaragua's responses to Costa Rica's evidence of breaches

23. Mr. President, Members of the Court, my final point addresses Nicaragua's pleas in response to Costa Rica's evidence of the breaches of its right of navigation.

24. First, Nicaragua argues that it has permitted navigation by Costa Rican police vessels carrying their arms only as a matter of "border courtesy"[169]. This argument amounts to a denial of the existence of rights of navigation with armed police vessels.

25. Second, Nicaragua makes a plea of acquiescence: it argues that "Costa Rica has repeatedly recognized [the] need to obtain permission" from Nicaragua to navigate on the San Juan[170]. In support of its allegation, Nicaragua refers to two incidents, both of which occurred in 2006, well after the institution of proceedings in the present case. The first of these is the request from Dr. Ching[171]. As I have explained, Dr. Ching was put in the position of having to change her "request for collaboration" to a "request for authorization"[172]; otherwise health service officials would be denied permission to transit on the San Juan. It appears that the intention behind forcing her to request written permission in these terms was to produce evidence to support Nicaragua's claim in the present proceedings.

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[169] CMN, para. 1.3.43.

[170] CMN, para. 6.2.11.

[171] CMN, para. 6.1.12; CMN, Ann. 51.

[172] RCR, Ann. 55, p. 292.

26. The second incident Nicaragua refers to in support of its plea of acquiescence is a note from "the Christian and Missionary Alliance of Horquetas" relating to its missionary work[173]. This was a request made by a private entity and as such, its views and actions cannot be imputed to the State of Costa Rica.

27. In respect of police navigation, Nicaragua claims in its Rejoinder that Costa Rican police "routinely requested and obtained prior authorization from the Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts"[174]. The only evidence Nicaragua submits is affidavit evidence from Nicaraguan army officers, annexed to its Rejoinder; it has already been pointed out that none of these affidavits are supported by a single piece of documentary evidence. The affidavit and documentary evidence Costa Rica has been able to produce in the short time available demonstrates that there was no practice of requesting prior authorization for public navigation[175], and these Nicaraguan affidavits cannot be relied upon[176].

28. Costa Rica affirms its rejection of any and all allegations by Nicaragua that it has acquiesced in Nicaragua's breaches of its perpetual right of free navigation on the river and its related rights.

Conclusions

29. Mr. President, Members of the Court, the evidence I have addressed today leads to the conclusion that Nicaragua has breached Costa Rica's rights of navigation with public vessels. By prohibiting Costa Rican public vessels from navigating on the San Juan, Nicaragua has breached Costa Rica's treaty right to navigate on the San Juan, its right to protect its navigation for purposes of commerce, its right to safeguard the San Juan and its obligation to defend the common bays. By the imposition of a requirement to obtain a consular visa in advance, Nicaragua has also breached Costa Rica's perpetual right of free navigation. These violations have prevented Costa Rican government officials from navigating on the San Juan to provide essential health, social and

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[173] CMN, Ann. 52; CMN, para. 6.2.13.

[174] RN, para. 5.80.

[175] See, Ann. IV and Ann. V to letter filed on 27 Nov. 2008 by Costa Rica.

[176] See case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports* 2005, p. 203, para. 65 ; pp. 218-219, para. 129 ; case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 70.

security services to riparians. Local communities along the San Juan have suffered as a result, and in particular Costa Rica has been unable to provide basic health services to 450 people, including 200 children.

Mr. President, that concludes my submission. I would ask you to call on Professor Kohen.

The PRESIDENT: I thank Ms Parlett for her presentation and I invite Professor Kohen to take the floor.

M. KOHEN :

LES DROITS CONNEXES DU COSTA RICA ET LEURS VIOLATIONS PAR LE NICARAGUA

1. Monsieur le président, Messieurs les juges, il m'incombe maintenant de vous présenter les droits connexes du Costa Rica sur le fleuve San Juan, ainsi que leurs violations par le Nicaragua. James Crawford et Kate Parlett vous ont déjà parlé des droits de protection du commerce, de protection du San Juan et de défense du fleuve et de la baie de San Juan del Norte, ainsi que des droits d'approvisionnement des postes frontière. Je vais aborder les droits suivants :

A. droit d'accoster sur la partie de la rive nicaraguayenne où la navigation est commune ;

B. droit d'obtenir du Nicaragua qu'il s'acquitte de son obligation de faciliter et d'accélérer la circulation sur le fleuve ;

C. droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien ;

D. droit de pêche des résidents de la rive costa-ricienne à des fins de subsistance.

A. Droit d'accoster sur la partie de la rive nicaraguayenne où la navigation est commune

2. Dans sa dernière partie, l'article VI du traité de 1858 reconnaît un second droit, connexe à celui de la libre navigation : «Les bateaux des deux pays auront le droit d'accoster indistinctement sur l'une ou l'autre rive de la portion du fleuve où la navigation est commune sans qu'aucune taxe ou droit ne soit perçu, sauf accord entre les deux Gouvernements.»[177]

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[177] Traduction anglaise : «The vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.» (MCR, vol. II, annexe 7 *b)*.) Original en espagnol : «Las embarcaciones de uno u otro país podrán indistintamente atracar en las riberas del río; en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, a no ser que se establezca entre ambos Gobiernos.» (MCR, vol. II, annexe 7 *a)*.) (Dossier de plaidoiries, onglet n° 47.)

a) L'interprétation nicaraguayenne du droit d'accostage est inadmissible

3. Le droit nicaraguayen d'accoster sur la rive costa-ricienne est scrupuleusement respecté. Des riverains et des fonctionnaires nicaraguayens traversent régulièrement le San Juan pour faire leurs achats au Costa Rica[178].

4. Le Nicaragua pour sa part tente de vider de sa substance le droit costa-ricien d'accoster. Il prétend qu'il existe uniquement pour les navires transportant des marchandises — «articles de commerce» —, mais que cela ne signifie pas un droit de libre commerce avec ces marchandises sur la rive nord, car le traité de 1858 — nous disent-ils toujours — n'est pas un traité de libre-échange[179]. La position de l'Etat défendeur s'écroule finalement en raison de ses propres contradictions : à quoi bon alors la navigation «avec des articles de commerce» ? A quoi bon un droit d'accoster exempté des taxes ? A en croire le défendeur, ce que le Costa Rica aurait obtenu en 1858 serait le droit de promener des marchandises sur le San Juan ou de les vendre en territoire costa-ricien.

5. Que ceci ne soit pas le cas est, entre autres, démontré par la preuve apportée par la Partie adverse, selon laquelle la navigation «avec des articles de commerce» s'exerce en bonne partie en vue de leur vente à San Juan del Norte[180].

b) L'exigence de l'accostage et du paiement d'un droit d'appareillage est incompatible avec l'article VI du traité

6. La violation du droit d'accostage commise par le Nicaragua est patente. *Primo*, les bateaux costa-riciens ont le droit d'accoster quand ils le décident et non quand le Nicaragua l'ordonne. *Secundo*, ils ont le droit de le faire exemptés des taxes. Or, cet Etat impose d'abord d'accoster et ensuite de payer un «droit d'appareillage» pour continuer à naviguer. A cela s'ajoute l'exigence du visa et de toutes les autres taxes que nous avons déjà examinées.

7. Le Costa Rica a apporté la preuve des agissements du Nicaragua[181], que celui-ci n'a d'ailleurs pas démentie.

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[178] Déclaration sous serment du colonel Ricardo Sánchez, 7 décembre 2006, CMN, vol. II, annexe 91.

[179] CMN, par. 4.1.48.

[180] Déclaration sous serment de M. Rigoberto Acevedo Ledezma, 27 mai 2008, DN, vol. II, annexe 66 ; déclaration sous serment du lieutenant-colonel Juan Bosco Centeno Arostegui, 9 mars 2008, DN, vol. II, annexe 69, p. 430.

[181] MCR, par. 5.06-5.53 ; RCR, par. 4.05.-4.11.

B. Droit d'obtenir du Nicaragua qu'il s'acquitte de son obligation de faciliter et d'accélérer la circulation sur le fleuve San Juan

a) De nouvelles obligations de moyens

8. Selon le Nicaragua, l'accord de 1956 n'ajoute rien au régime juridique du fleuve San Juan établi par le traité de 1858[182]. Cette vision prive l'article premier de l'accord de 1956 de tout effet utile, cet article contient deux nouvelles obligations de moyens bien précises : *primo*, celle de *faciliter et* d'*accélérer* la circulation sur le San Juan ; *secundo*, celle de *faciliter* le fonctionnement des services de transport des entreprises d'un Etat sur le territoire de l'autre[183].

b) Tout le comportement nicaraguayen comporte un manquement flagrant aux obligations découlant de l'accord de 1956

9. L'ensemble des agissements du Nicaragua, que nous avons décrit au cours de ces deux jours, montre, non seulement que le Nicaragua ne fait rien pour faciliter et accélérer la circulation et l'opération des services de transports costa-riciens sur le San Juan, mais au contraire, qu'il fait tout pour les entraver, violant ainsi les obligations stipulées dans l'accord de 1956.

C. Droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien

10. Passons maintenant au droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien.

a) Subordonner la navigation à l'exigence de porter le pavillon nicaraguayen revient à nier le droit de libre navigation du Costa Rica

11. Entre 1998 et 2001, le Nicaragua a de manière intermittente interdit aux bateaux costa-riciens d'arborer leur pavillon[184]. Après des échanges diplomatiques, le Nicaragua avait cessé d'imposer cette exigence[185], qu'il a pourtant renouvelée aussitôt après l'introduction de la

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[182] CMN, par. 6.2.1-6.2.9 ; DN, par. 2.116.

[183] Accord complémentaire à l'article IV du pacte d'amitié, 9 janvier 1956, NURT, vol. 1465, p. 227 (MCR, vol. 2, annexe 24) (dossier de plaidoiries, onglet n° 48).

[184] *La Nación*, San José, 4 août 1998, MCR, vol. 5, annexe 147; *La Nación*, San José, 27 septembre 1998, MCR, vol. 5, annexe 152. Voir aussi, déclaration sous serment de Sergio Gerardo Ugalde Godínez, 5 mai 2001, MCR, vol. 4, annexe 83.

[185] Note du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, 9 mai 2001, MCR, vol. 3, annexe 71 ; note du ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, au ministre des affaires étrangères du Costa Rica, Roberto Rojas López, 3 août 2001, MCR, vol. 3, annexe 72 ; note du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, 26 septembre 2001, MCR, vol. 3, annexe 73.

présente instance en septembre 2005. Ce comportement perdure à ce jour, malgré les demandes de cessation du Costa Rica[186]. En réponse à cette demande, le Nicaragua a invoqué le droit souverain d'exercer un tel pouvoir sur son territoire[187]. Nous en avons déjà démontré l'absence de fondemen juridique[188].

b) L'attitude du Nicaragua contredit sa propre position de principe exprimée il y a cent quarante ans

12. Ce comportement est d'autant plus regrettable que le Nicaragua lui-même, il y a cent quarante ans, protestant contre la présence de navires sur le San Juan battant pavillon des Etats-Unis, a expliqué au secrétaire d'Etat américain que le Gouvernement du «Nicaragua ne se sent pas disposé à consentir à ce qu'un autre pavillon que *le sien et celui du Costa Rica, Etat frontalier*, soit utilisé dans la navigation de ses eaux intérieures»[189].

D. Le droit de pêche à des fins de subsistance

a) La recevabilité de la demande costa-ricienne relative au droit de pêche

13. Permettez-moi de traiter maintenant de la question du droit de pêche à des fins de subsistance des habitants de la rive costa-ricienne du San Juan. C'est seulement dans sa duplique que le Nicaragua a invoqué l'irrecevabilité de la demande du Costa Rica y relative, sous prétexte qu'elle n'avait pas été formulée dans la requête[190].

14. Cette démarche est surprenante, car le Nicaragua est directement entré en matière dans son contre-mémoire[191]. De ce fait, il a implicitement accepté la recevabilité de la demande relative aux droits de pêche. On se trouve ici dans une situation semblable à celle décrite par la Cour

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[186] Note du ministre des affaires étrangères du Costa Rica, Roberto Tovar Faja, au ministre des affaires étrangères du Nicaragua, Norman Caldera Cardenal, 20 octobre 2005, MCR, Vol. 3, annexe 81.

[187] Note du ministre des affaires étrangères du Nicaragua, Norman Caldera Cardenal, au ministre des affaires étrangères du Costa Rica, Roberto Tovar Faja, 9 novembre 2005, MCR, Vol. 3, annexe 82.

[188] Plaidoirie de M. Caflisch du 3 mars 2009, par. 28-32.

[189] Texte en anglais: «Nicaragua does not feel disposed to consent that any other flag, except *her own and the one of Costa Rica, as bordering state*, should float in the navigation of her interior waters.» Lettre du ministre nicaraguayen à Washington, Luis Molina, au Secrétaire d'Etat des Etats-Unis d'Amérique, M. Seward, du 7 octobre 1868, *in* P. Perez Zeledón, *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua* (Washington DC: Gibson Breos, 1887), p. 100, MCR, vol. 6, annexe 207, p. 829 (dossier de plaidoiries, onglet n° 49).

[190] DN, par. 4.68.

[191] CMN, par. 5.1.2- 5.1.16.

permanente dans l'affaire des *Ecoles minoritaires en Haute-Silésie* : «Le contre-mémoire lui-même démontre que l'agent du Gouvernement polonais avait déjà porté son attention sur ce fait et qu'il aurait fort bien pu poser la question de compétence dans son contre-mémoire s'il l'avait voulu.» (*Droits de minorités en Haute-Silésie (écoles minoritaires), arrêt n° 12, 1928, C.P.J.I. série A n° 15*, p. 25.)

15. Se fiant à la position de l'Etat défendeur exprimée dans le contre-mémoire, le Costa Rica a répondu dans sa réplique aux arguments de fond développés par le Nicaragua dans sa première pièce écrite. On est dans une situation semblable à celle dans laquelle «un Etat défendeur a, par sa conduite devant la Cour ou dans ses relations avec la partie demanderesse, agi de manière telle qu'il a accepté la compétence de la Cour» (*Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France)*, arrêt du 4 juin 2008, par. 61). Clairement, le Nicaragua est ainsi forclos d'invoquer l'irrecevabilité de cette demande. Par conséquent, nous demandons respectueusement à la Cour de ne pas entrer en matière à propos de cette exception nicaraguayenne.

16. Du reste, même si la Cour acceptait d'examiner l'exception d'irrecevabilité, celle-ci serait dépourvue de fondement et devrait ensuite être rejetée. Les considérations qui suivent et qui démontrent le caractère infondé de cette exception d'irrecevabilité sont donc présentées à titre purement subsidiaire.

17. La raison de l'invocation du droit de pêche dans le mémoire est évidente : la violation par le Nicaragua de ce droit s'est produite après l'introduction de l'instance par le Costa Rica[192]. Le Costa Rica s'est réservé le droit de compléter ou de préciser sa requête[193]. C'est ce qu'il a fait dans sa première pièce écrite en réaction aux nouveaux agissements illicites de l'Etat défendeur, actes directement liés à la requête et constituant même une conséquence de son dépôt.

18. La Cour a déclaré qu'une demande introduite en cours d'instance est recevable si elle est «implicitement contenue … dans [l]a requête» (*Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 38) ou découle «directement de la question qui fait l'objet de

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[192] MCR, par. 5.142. Voir aussi déclaration sous serment de Victor Julio Vargas Hernández, 6 juillet 2006, MCR, vol. 4, annexe 105 ; déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martínez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109.

[193] Requête, par. 12.

cette requête» *(Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 203, par. 72)»[194]. La demande du Costa Rica tombe sous le coup de l'une et de l'autre de ces formules, pourtant alternatives.

19. En effet, dans sa requête, le Costa Rica a affirmé sous la rubrique «Nature du différend» que, «[p]our le cas où le Nicaragua prendrait les sanctions économiques visées ci-dessus [celles que l'Assemblée nationale du Nicaragua avait menacé d'imposer en cas de saisine de la Cour par le Costa Rica], ou toute autre sanction illicite, ou toute autre mesure propre à aggraver ou à étendre le présent différend, le Costa Rica demande en outre la cessation de ce comportement et la réparation intégrale des pertes subies»[195].

20. Incontestablement, l'interdiction du droit de pêche à des fins de subsistance constitue, soit une «autre sanction illicite», soit une «autre mesure propre à aggraver ou à étendre le présent différend». De ce fait, la demande relative aux violations du droit de pêche est parfaitement recevable car elle peut être incluse dans la demande originale.

21. Enfin, la prétention nicaraguayenne selon laquelle l'inexistence d'un droit de pêche dans le traité de 1858 rendrait la demande irrecevable n'est aucunement fondée. Sous la rubrique «Droit applicable» de la requête, on trouve : *«e)* d'autres règles et principes applicables du droit international»[196].

22. C'est par conséquent la demande tardive d'irrecevabilité du Nicaragua qui est irrecevable. Et même si elle était jugée recevable, elle devrait être ensuite rejetée.

b) *L'existence du droit de pêche à des fins de subsistance*

23. Venons-en donc à l'existence de ce droit de pêche à des fins de subsistance. Le Costa Rica a invoqué une règle coutumière locale, ainsi qu'un droit datant de l'époque coloniale[197].

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[194] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 266, par. 67 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 110.

[195] Requête, par. 10. Original en anglais : «In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.» (Dossier de plaidoiries, onglet n° 50.)

[196] Requête, par. 1. Original en anglais : «*(e)* other applicable rules and principles of international law».

[197] MCR, par. 2.08, 4.124-4.128, 5.141 ; RCR, par. 3.115-3.119.

24. Plusieurs éléments permettent d'affirmer l'existence d'un droit de pêche. En effet, un tel droit appartenant aux riverains des deux rives du fleuve San Juan avait déjà été explicitement reconnu au tout début de la période coloniale et n'a jamais été révoqué[198]. Le Nicaragua ne nie pas l'existence de ce droit selon l'ordonnance royale du 29 novembre 1540, mais considère que la question ne mérite pas d'être discutée car cette ordonnance aurait été abrogée par une charte royale de 1573[199]. Ceci n'est pas pertinent, comme il a été expliqué hier par M. Arnoldo Brenes[200]. Du reste, le fait de la succession d'Etats n'est pas en soi une raison pour mettre fin à ce régime territorial, pour reprendre l'expression de l'article 12 de la convention de Vienne sur la succession d'Etats en matière de traités, que votre Cour a reconnue comme l'expression du droit coutumier[201].

25. Le traité Cañas-Jeréz n'aborde pas la question, mais son silence ne saurait être interprété comme une abrogation de ce droit traditionnel, qui peut donc être considéré comme ayant survécu à la période coloniale.

26. La pêche visée se pratique à des fins de subsistance[202]. Le Nicaragua ne le conteste pas[203]. Cette activité obéit donc à une *nécessité* des habitants qui la pratiquent, en tant que moyen de subvenir à leurs besoins alimentaires.

27. Le Comité des droits économiques, sociaux et culturels des Nations Unies, dans son commentaire de l'article 11 du Pacte international de droits économiques, sociaux et culturels (auquel le Nicaragua est partie), affirme que «[l]'obligation qu'ont les Etats parties de *respecter* le droit de toute personne d'avoir accès à une nourriture suffisante leur impose de *s'abstenir de prendre des mesures qui aient pour effet de priver quiconque de cet accès*»[204]. Le Nicaragua a dû prendre en considération cette obligation qui existait sans nul doute avant l'entrée en vigueur du Pacte. En fait, depuis l'établissement des premières habitations et des premiers villages sur la rive costa-ricienne, l'Etat défendeur n'a jamais privé leurs habitants de l'accès à la pêche de subsistance

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[198] MCR, par. 2.08 et 5.141 ; MCR, vol. 2, annexe 1. (Dossier de plaidoiries, onglet n° 51.)

[199] CMN, par. 5.1.12 et 5.1.13.

[200] CR 2009/2, p. 19-21, par. 15-21 (Brenes).

[201] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 72, par. 123.

[202] MCR, par. 4.128 ; RCR, par. 4.56-4.58.

[203] CMN, par. 5.1.6.

[204] Comité de droits économiques, sociaux et culturels, *Observation générale 12*, 12 mai 1999, doc. E/C.12/1999/5, par. 15.

sur le fleuve San Juan. Malheureusement, le Nicaragua a modifié sa conduite après le dépôt de la requête. Bien entendu, ce changement de comportement est trop tardif pour prétendre à l'inexistence du droit de pêche.

28. Le Nicaragua admet donc l'existence d'une pratique de pêche par les habitants de la rive costa-ricienne[205]. Il conteste seulement l'existence d'une *opinio iuris* rendant cette pratique obligatoire et, de plus, prétend que celle-ci est récente[206]. Pour le Nicaragua, il s'agit d'une simple courtoisie[207]. Toutefois, le Nicaragua n'a pas présenté le moindre élément prouvant qu'il agissait à titre de courtoisie.

29. La Partie adverse ne peut pas s'abriter derrière l'argument selon lequel il appartiendrait au Costa Rica de prouver l'existence de la coutume[208]. Du moment qu'il reconnaît l'existence d'une pratique constante sur son territoire qui va à l'encontre de sa souveraineté, il lui appartient de réagir. Pour l'exprimer avec les mots que vous avez employés dans l'affaire du *Temple de Préah Vihéar* : «les circonstances étaient de nature à appeler dans un délai raisonnable une réaction de la part des autorités» (*Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 23). L'absence de réaction paraît très étrange de la part d'un Etat aussi soucieux de protéger sa souveraineté que le Nicaragua.

30. Le Nicaragua n'a rien dit, rien empêché, rien revendiqué, n'a émis aucun avertissement, alors que des individus en provenance d'un territoire étranger se sont adonnés à la pêche dans des eaux relevant de sa souveraineté. Cela ne correspond pas au comportement d'un Etat qui estime que les individus en question ne possèdent aucun droit d'agir comme ils le font. Jusqu'à la fin de l'année 2005, les autorités nicaraguayennes n'ont ni empêché les riverains résidant au Costa Rica de pêcher dans les eaux du San Juan, ni leur ont donné l'autorisation de le faire[209].

31. La situation est donc semblable à celle décrite par votre Cour dans l'affaire du *Droit de passage sur territoire indien* à l'égard des personnes privées, des fonctionnaires civils et des

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[205] CMN, par. 5.1.6.

[206] CMN, par. 5.1.7-5.1.8 ; DN, par. 4.68.

[207] CMN, par. 5.1.6.

[208] CMN, par. 5.1.5.

[209] MCR, par. 5.142.

marchandises en général : une pratique constante et uniforme de pêche à des fins de subsistance, acceptée comme étant le droit[210].

32. La situation ressemble aussi à celle des droits de pacage et d'agriculture des habitants d'un Etat sur les terres des Etats voisins, comme vous l'avez constaté dans l'affaire de l'*Ile de Kasikili/Sedudu*[211]. La sentence arbitrale *Erythrée/Ethiopie* se réfère également aux droits coutumiers des populations locales d'avoir accès au fleuve[212].

33. Le Nicaragua a prétendu que l'existence d'une telle coutume en Afrique «est une pure invention du Costa Rica» et que les situations décrites dans l'arrêt *Kasikili/Sedudu* et la sentence arbitrale *Erythrée/Ethiopie* n'ont rien à voir avec la situation dans la présente affaire[213]. Ce sont pourtant là des situations semblables où des populations frontalières ont un droit d'accès au territoire des Etats voisins et même un droit d'exploiter certaines ressources, certes de manière très limitée, tout comme c'est le cas de la pêche de subsistance dans le San Juan.

34. L'attitude radicalement contraire que le Nicaragua affirme avoir adoptée s'agissant de la navigation des bateaux de la force publique, même si elle ne correspond pas à la réalité, est révélatrice du type du comportement que le Nicaragua croit devoir observer pour préserver ses prétendus droits. Or, le Nicaragua n'a rien fait de pareil au sujet de la pêche de subsistance des habitants de la rive costa-ricienne.

35. J'imagine l'objection : on me dira que la présence des navires de la police costa-ricienne sur les eaux du San Juan est beaucoup plus importante que la pêche à des fins de subsistance. Je rétorquerai en mentionnant le zèle extrême dont a aussi fait preuve le Nicaragua relativement à d'autres questions bien plus mineures que la pêche, comme par exemple celle du pavillon des navires costa-riciens. C'est un zèle totalement injustifié, certes, mais un zèle qui démontre la façon dont le Nicaragua estime devoir agir lorsqu'il considère que sa souveraineté est en cause.

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[210] *Droit de passage sur territoire indien (Portugal c. Inde), fond, arrêt, C.I.J. Recueil 1960*, p. 40.

[211] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1094, par. 74.

[212] Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 avril 2002, 41 *ILM* 1057, 1116 (par. 7.3).

[213] CMN, par. 5.1.9.

36. Un autre élément pertinent est l'aveu du Nicaragua selon lequel sa réglementation interne ne s'applique pas à la pêche à des fins de subsistance des résidents de la rive costa-ricienne[214].

37. Le contre-mémoire affirme que «le Nicaragua a généralement toléré une utilisation limitée du San Juan par des riverains costa-riciens pour la pêche non commerciale» ou qu'il «a accepté, à titre de courtoisie, la pêche de subsistance ou de loisir par les riverains costa-riciens»[215]. Aucune distinction n'est faite entre la pêche depuis la rive et la pêche en canoë sur le fleuve. La duplique prétend en revanche que seule la pêche depuis la rive est permise[216].

38. L'objectif du Nicaragua est double. D'une part, nos amis nicaraguayens se sont rendu compte qu'ils n'avaient rien objecté dans leur contre-mémoire contre cette navigation «sans articles de commerce», du moins avant que les poissons ne soient pêchés… D'autre part, il s'agit d'une tentative pour justifier d'une manière ou d'une autre la saisie des canoës des résidents costa-riciens s'adonnant à la pêche. Il paraît même que le Nicaragua aurait découvert, au moment de la rédaction de sa duplique, que plusieurs espèces de poissons seraient menacées d'extinction du fait de leur pêche illégale par des riverains costa-riciens[217]. Naturellement, le Costa Rica rejette toutes ces allégations infondées de dernière minute.

39. Le mémoire et la réplique du Costa Rica ont fourni plusieurs déclarations sous serment des riverains costa-riciens. Il en découle qu'aucune distinction n'est faite entre la pêche depuis la rive costa-ricienne et celle depuis des canoës dans le fleuve[218].

40. Dans le sillage des nouvelles explications écologistes de l'Etat défendeur, la duplique nous informe que le Nicaragua interdit la pêche à ses propres riverains, mais la permet à ceux de la rive costa-ricienne[219]. Décidemment, la courtoisie nicaraguayenne atteint ici des sommets : le

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[214] Original en anglais : «the internal regulations of Nicaragua are naturally applicable and are generally enforced» (CMN, par. 5.1.16).

[215] Original en anglais : «Nicaragua has usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians» ; «Nicaragua has accepted, as a matter of courtesy, subsistence or leisure fishery by Costa Rican riparians» (CMN, par. 5.1.6).

[216] DN, par. 4.67.

[217] DN, par. 4.58.

[218] Voir déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martínez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108 ; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109. Voir aussi les déclarations sous serment de Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 juillet 2007, RCR, vol. 2, annexe 54.

[219] DN, par. 4.67.

Nicaragua passe outre sa propre législation et discrimine ouvertement ses propres habitants pour permettre gracieusement à ceux du Costa Rica de pêcher sur le San Juan ! En réalité, cette attitude s'explique, mieux que par la courtoisie, par la conviction qu'elle revêt un caractère obligatoire.

41. Le Costa Rica est convaincu que cette pratique, doublée de l'inapplication totale de la réglementation interne à son égard et d'une absence totale de réaction négative du Nicaragua, a donné naissance à une règle coutumière locale. Peu importe au fond que l'on parle de coutume locale, d'acquiescement, d'accord tacite[220], de régime territorial ou encore de subsistance d'un droit traditionnel datant de l'époque coloniale auquel il n'a jamais été dérogé. Le résultat est le même : les résidents de la rive costa-ricienne ont un droit de pêche à des fins de subsistance dans les eaux du San Juan.

c) La violation par le Nicaragua du droit de pêche à des fins de subsistance

42. Depuis l'introduction de la présente instance, le Nicaragua a interdit aux riverains costa-riciens toute activité de pêche dans les eaux du San Juan. Ceux d'entre eux qui tentent de pêcher risquent de voir leurs instruments de pêche ainsi que leurs bateaux saisis[221]. De telles mesures punitives ont été effectivement prises vis-à-vis des riverains qui, toute leur vie durant, ont pêché dans le San Juan pour assurer leur subsistance[222].

43. Le Nicaragua a affirmé de manière générale qu'il n'a jamais donné l'ordre d'empêcher ce type de pêche[223]. Mais il n'a pas contesté la véracité des témoignages fournis par le Costa Rica, se bornant à signaler qu'il s'agit seulement d'« une poignée de témoignages sous serment»[224]. Qui plus est, il n'a pas non plus produit des preuves qui contredisent les allégations du Costa Rica.

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[220] Cf. *Droit de passage sur territoire indien (Portugal c. Inde), fond, arrêt, C.I.J. Recueil 1960*, p. 39-40 ; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt du 23 mai 2008*, par. 120-121.

[221] Déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109.

[222] Voir déclaration sous serment de Victor Julio Vargas Hernández, 6 juillet 2006, MCR, vol. 4, annexe 105 ; déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martinez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108 ; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109. Voir aussi les déclarations sous serment de Victor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 juillet 2007, RCR, vol. 2, annexe 54.

[223] CMN, par. 5.1.15.

[224] CMN, par. 5.1.8.

Conclusion

44. Monsieur le président, Messieurs de la Cour, j'arrive à ma conclusion, à la triste conclusion que les droits costa-riciens ont non seulement été violés, mais également niés ou vidés de leur contenu par le Nicaragua.

45. Je vous remercie de votre attention et vous prie de donner la parole à mon collègue et ami James Crawford.

The PRESIDENT: I thank Professor Kohen for his statement and I now invite Professor Crawford to take the floor.

Mr. CRAWFORD:

REMEDIES SOUGHT

Introduction

1. Mr. President, Members of the Court, it is my final task to outline the remedial issues in this case. In doing so, I will be, if I say so myself, commendably brief.

Costa Rica's request for a declaration of violations of Nicaragua's obligations

2. First, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying the exercise of the right of free navigation and related rights on the San Juan.

3. Nicaragua does not dispute that it would be appropriate for you to issue a declaration in the present case although, of course, it disagrees as to the content of that declaration. I will return shortly to the declaration Nicaragua would have you make[225].

4. As your predecessor, the Permanent Court, noted in 1926, a declaration serves "to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, p. 20). Costa Rica might be forgiven

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[225] CMN, 7.1.10; RN, 6.3.

for feeling that it needs one of these definitive statements every 50 or so years but certainly that is what we seek in this case.

Costa Rica's request for cessation of continuing breaches

5. Secondly, Nicaragua is obliged to cease all internationally wrongful conduct having a continuing character, which is the case with, in effect, all of the Nicaraguan conduct of which we complain.

Restitution, including abrogation of all legislative and administrative measures infringing Costa Rica's rights

6. Thirdly, Costa Rica seeks restoration of the situation prior to the breaches of the obligations. This includes the abrogation of all legislative and administrative measures taken by Nicaragua in breach of the Treaty of Limits.

7. Nicaragua argues that this request is "abusively vague" and, more importantly, that

> "it goes far beyond the inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. Among these limitations [says Nicaragua] the most fundamental is the one which prompts the Court to refrain from issuing orders to sovereign States."[226]

8. Now, of course it is true that "[t]here are inherent limitations on the exercise of the judicial function" by this Court, as you noted in the *Northern Cameroons* case (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29). But issuing orders to States is not excluded by any such inherent limitation. The Court gives decisions in its contentious jurisdiction which are binding on States and to describe those States as "sovereign", which they are, is not to the purpose. Nicaragua recites a number of cases in support of its alleged proposition that the Court must refrain "from issuing orders to sovereign States"[227], but none of those cases are apposite.

9. I will take simply one for present purposes, the *Arrest Warrant* case. In that case, having found that the existing arrest warrant was unlawful, you held "Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated" (*I.C.J. Reports 2002*, para. 76). Now, it is true that the means by which Belgium was to cancel the

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[226] RN, 6.40.

[227] RN, 6.40.

warrant were left to Belgium to decide, but the Court in that passage made two orders to Belgium: (1) to cancel the warrant, and (2) to inform the authorities of the other States to whom it was circulated. There is no trace of any inherent limitation in that decision. And we say that the same thing is true for the other cases on which Nicaragua relies.

10. In short, the request that you order restitution in the form of abrogation of all legislative and administrative measures which are in breach of Nicaragua's international obligations to Costa Rica is legitimate and is fully within your authority.

Compensation

11. Mr. President, Members of the Court, Costa Rica also seeks pecuniary compensation for all damage caused by the unlawful acts committed by Nicaragua.

12. In its Rejoinder, Nicaragua makes three arguments against the claim for compensation.

13. The first is that claims for losses caused for charges, visas and permits required for Costa Rican vessels and citizens are diplomatic protection claims to which the requirement to exhaust local remedies applies. But, of course, Costa Rica's claim is for navigational rights of Costa Rica as a State under the 1858 Treaty[228].

14. The losses caused to Costa Rica or to Costa Rican individuals for charges, visas and permits are a direct result of Nicaragua's breaches of Costa Rica's treaty rights. They have been caused by Nicaragua's internationally wrongful acts in violation of an interstate bilateral treaty.

15. I note in passing that a similar claim was made by Nicaragua in its applications against the United States and Costa Rica in the 1980s, seeking compensation "both on its own behalf and in respect of wrongs inflicted upon its nationals"[229]. Nicaragua made no suggestion then that these claims involved elements of diplomatic protection; nor did this Court do so when it upheld these claims in respect of freedom of navigation under the bilateral treaty of 1956 (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 140, paras. 279-280;

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[228] MCR, 4.16; RCR, 5.05.

[229] *Military and Paramilitary Activities in and against Nicaragua, Judgment, I.C.J. Reports 1986*, p. 20, para. 17. See also, MN, p. 112, para. 3.

dispositif (7), (11) and (14)). Yet again, Nicaragua is very happy to come here as Applicant. When it comes here as Respondent, it seems to play by a different set of rules!

16. Finally, even if Costa Rica's claims for compensation could be characterized as diplomatic protection claims, they are incidental to the Costa Rican claim for breach of its own treaty rights. Any element of diplomatic protection is merely incidental and secondary: they are certainly *not*, as Nicaragua alleges, clearly distinct[230]. They are expressed in the same provision of the same treaty. To repeat, Costa Rica's claims in respect of compensation are analogous to the claims made by Nicaragua in its earlier applications where no local remedies were pursued, much less exhausted.

17. Nicaragua's second argument against the claim for compensation is that these are "entirely unsubstantiated claims" with no sufficient specification of the character of the injury and its quantum[231]. This argument is based upon a misconception of the circumstances in the *Fisheries Jurisdiction* case (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, para. 76). There, Germany requested "a declaration of principle that Iceland is under an obligation to make compensation to [Germany] in respect of all unlawful acts of interference with the fishing vessels of [Germany]" (*I.C.J. Reports 1974*, p. 204, para. 74). Germany did not request in that case that compensation be assessed in a subsequent phase of the proceedings (*ibid.*, pp. 204-205, para. 76). The Court noted that Germany's request would have be appropriate "provided the claimant asks the court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed" (*ibid.*, pp. 204-205, para. 76). That is the crucial point. Costa Rica *has* asked the Court to reserve determination of the amount of damage payable to a subsequent phase of these proceedings. Precisely the same request was made by Nicaragua in the *Military and Paramilitary Activities* case (*I.C.J. Reports 1986*, p. 142, para. 284) against the United States and accepted by the Court.

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[230] RN, para. 6.34.

[231] RN, paras. 6.41-6.43.

Costa Rica's request for assurances and guarantees of non-repetition

18. Costa Rica also requests the Court to determine that Nicaragua provide assurances and guarantees against repetition of its internationally wrongful acts. It is fair to say that the subject of assurances and guarantees against repetition has had something of a rocky ride in the Court. But in the context of Nicaragua's continuing denial of the existence of Costa Rican rights and its continuing violations of these rights despite repeated decisions and commitments to the contrary, Costa Rica, to quote the words of the Commentary to the ILC Articles "has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily"[232]. That is a situation in which assurances and guarantees of non-repetition are appropriate.

Nicaragua's request for a declaration

19. Mr. President, Members of the Court, Nicaragua itself seeks what I might call a counter-declaration on sundry questions. I will briefly address each of these requests.

20. The first is a counter-declaration that Costa Rica is required to comply with the regulations Nicaragua has imposed on navigation and on landing in the San Juan[233]. But as we have shown, these regulations are contrary to the treaty and to the applicable instruments. That excludes any possibility of a declaration in the contrary sense.

21. The second request is for a counter-declaration that Costa Rica "has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks"[234]. As a matter of fact, no such services are provided. There are no navigational aids, there are no aids on the bank. You clamber up a muddy bank. There is no evidence of the expenditure of any money. But even if they were, compulsory payment for services on a river which is subject to a right of free navigation, perpetual as it is in this case, is excluded by the Treaty of Limits.

22. Third, Nicaragua asks for a counter-declaration that Costa Rica must comply with all reasonable charges for improvements in navigation on the river[235]. Again, as a matter of fact, there

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[232] United Nations, Report of the International Law Commission on the work of its Fifty-third session, *General Assembly Official Records, Fifty-sixth session, Supplement No. 10* (A/56/10, 2001), 219; MCR, 6.19.

[233] RN, 6.5; see also 6.17.

[234] RN, 6.5.

[235] RN, 6.5, see also 6.17.

are no such improvements. But in any event Nicaragua cannot subject Costa Rica's perpetual and free right of navigation to charges of any kind. This point was directly addressed in the Cleveland Award. Answering the fifth point of doubtful interpretation, President Cleveland expressly stated that "[t]he Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned", and this was true even when they included improvement of the river "for the common benefit"[236].

23. Fourth, Nicaragua asks you to declare that "[r]evenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty"[237]. But we have shown that Nicaragua's claim to limit Costa Rican public navigation by reference to articles of merchandise is without foundation[238].

24. Finally, Nicaragua asks you to declare that it has the right to dredge the San Juan to return the flow of water to that obtaining in 1858, even if this would affect the flow of water in the Colorado River[239].

25. Nicaragua's claim is without merit and without incidence for the present case. In the first place, there is no dispute between the Parties on the issue of dredging. In 2006, the Foreign Minister of Costa Rica, Mr. Tovar, expressed support in principle for improvement works on the San Juan[240]. Costa Rica has not changed its position since then. Second, the issue of dredging bears no relationship to the issues before the Court, which relate exclusively to rights of navigation and related rights. Improvement works may fall within Nicaragua's rights affirmed by President Cleveland. He said that Nicaragua is entitled "to execut[e] at her own expense and within her own territory such works of improvement", but he added the following proviso "*provided* such works of improvement do not result in the occupation or flooding or damage to Costa Rican territory; or in the destruction or serious impairment of the navigation of the said river

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[236] MCR, Ann. 16, p. 99, third paragraph.

[237] RN, 6.5.

[238] RCR, 5.30.

[239] RN, 6.5.

[240] See Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: RCR, Anns., Vol. 2, Ann. 42.

or any of its branches at any point where Costa Rica is entitled to navigate the same"[241], so there are significant limitations. But these issues are completely abstract. They do not arise in the absence of specific plans for particular dredging notified to Costa Rica. In short, this is not the place or time to deal with these questions: the parameters of the dispute before the Court are clearly defined.

Nicaragua's reservations

26. Finally I should refer to Nicaragua's so-called reservations. These relate to a claim that the Colorado River is an international waterway, and to potential claims against Costa Rica for ecological damage and even for diversion of the San Juan[242]. These reservations are not counter-claims nor do they relate to or arise from any relief sought by Costa Rica. They are entirely without incidence for the present case and it would not be appropriate for you to take them into account in any way. If Nicaragua wishes to present these claims or to sustain any argument based upon them, they ought to have been presented properly in these proceedings or in a new Application.

Conclusions

27. Mr. President, Members of the Court, there are no minor cases before the Court but there are sometimes compressed cases. I hope I may be forgiven, in that respect, one closing remark. In the time we have had to present our case, we have sought to do so as economically as possible and perhaps more quickly than desirable. We have not been able in the time available to deal with every issue raised in the pleadings — a situation exacerbated by the fact that Nicaragua's Rejoinder was far more substantial than its Counter-Memorial and that it contained additional evidence that *could* and *should* have been produced earlier. Any Nicaraguan assertions against us that we have not had time to deal with are firmly and categorically denied!

28. Mr. President, Members of the Court, that concludes Costa Rica's first round presentation. We thank you for your patient attention.

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[241] MCR, Anns., Vol. 2, Ann. 16. See also Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: RCR, Anns., Vol. 2, Ann. 42.

[242] CMN, p. 251; RN, 6.49.

The PRESIDENT: Thank you, Professor Crawford.

This marks the end of the first round of oral argument of the Republic of Costa Rica. Oral argument in the case will resume on Thursday 5 March 2009 at 10 a.m. in order for the Republic of Nicaragua to present its first round of oral argument. The sitting for the first round of oral argument of the Republic of Costa Rica is closed.

The Court rose at 1 p.m.

CR 2009/4

International Court of Justice | **Cour internationale de Justice**

THE HAGUE | **LA HAYE**

YEAR 2009

Public sitting

held on Thursday 5 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua)**

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le jeudi 5 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)**

COMPTE RENDU

Present: **President** **Owada**
Judges **Shi**
Koroma
Al-Khasawneh
Buergenthal
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Judge *ad hoc* **Guillaume**

Registrar **Couvreur**

The Government of the Republic of Costa Rica is represented by:

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as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit International; Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

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Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit International de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of the Republic of Nicaragua. Nicaragua will then conclude its first round of oral argument tomorrow, from 10 a.m. to 1.00 p.m. I shall now give the floor to the Agent of Nicaragua, His Excellency Ambassador Argüello Gómez.

Mr. ARGÜELLO:

1. Mr. President, Members of the Court, it is a renewed honour to be pleading before the principal judicial organ of the United Nations on behalf of my country in pursuit of the peaceful and amicable solution of some of the differences we have with our neighbour, the Republic of Costa Rica.

2. Before beginning our presentation, it is my privilege to congratulate the President and Vice-President on their election to this high international office and to welcome and congratulate the new Members who have just taken office, as well as those Members who have been re-elected. This is the first case that is publicly pleaded before the newly reconstituted Court and we are sure that its resolution will long be remembered with appreciation by the Parties.

3. The Nicaraguan delegation is composed of the Agent, counsel and advocates indicated in the written list provided to the Court. In addition, for today's pleadings, it will also be privileged with the presence of the Foreign Minister of Nicaragua, Mr. Samuel Santos.

I. HISTORICAL BACKGROUND

(a) *Colonial period*

4. Mr. President, Members of the Court, the historical record of the territorial issues dating from the colonial period until the first years of the independence from Spain in 1821 are of unquestionable interest but they were amply argued in the written pleadings and it is unnecessary to further take the Court's time on this matter.

5. Therefore, instead of reiterating this story, in response to the lengthy presentation of this topic last Monday by our Costa Rican colleagues, I would simply invite the Court to review the written pleadings and limit further comments to a few simple self-evident and even common-sense

observations. With respect to the only substantive territorial issue before the Court, the San Juan River, we might recall:

(a) The only ports or cities of any relevance to navigation in the San Juan River and the lake of Nicaragua were two locations that have always been an indisputable part of the Nicaraguan territory (slide CAG-1.) One was the port at the mouth of the San Juan River on the Caribbean — the Port of San Juan de Nicaragua — and the other was the lake port city of Granada at the shores of the great lake of Nicaragua. The only fortification along the whole route of the San Juan River was the Castillo de la Concepción, which has also always been indisputably part of Nicaragua.

(b) There was no city in the whole territory of Costa Rica during the colonial period that was even half the size or even close to the commercial importance of Granada. There was no city or population of any significant size in Costa Rica that could have benefited during the colonial period of the access from the Atlantic through the waterway system that began in the port of San Juan. On the Costa Rican side there were only very sparsely populated and far between villages that had access to the San Juan River.

(c) Therefore, there was no reason for the one and the same colonial sovereign of all these territories to have placed the administration — that is, what would become the raison d'être of the *uti possidetis* principle at the moment of independence — under the authority of a then very minor colonial entity, even in comparison with the other small Central American territories.

(b) *Post-colonial history*

6. After the independence of Nicaragua and the other Central American countries from Spain in 1821, the most coveted feature in the area was the great lake of Nicaragua, by far the largest body of sweet water in the Caribbean area covering an area of approximately 8,300 sq km, that is, roughly half the size of the territory of the neighbouring nation of El Salvador and 16 per cent of that of the territory of Costa Rica. The lake, together with its outlet to the Caribbean Sea and Atlantic Ocean, the San Juan River, made it the most promising site for the construction of a transoceanic canal.

7. This seeming gift of nature and its potential as a canal route has been the cause of the most difficult international problems faced by Nicaragua. Mr. George Weitzel, the Minister of the United States to Nicaragua in 1913, considered that: "In all the cases of controversies of Nicaragua . . . the true cause of the problem was desire to control the route of the interoceanic channel." (CMN, para. 1.2.26.)

8. (*circa* 1821) The possibilities of this natural waterway were not lost on Costa Rica, the nearest neighbour to the great lake and river of Nicaragua. Immediately after independence, Costa Rica took advantage of a civil war raging in Nicaragua in 1821 in order to annex an important part of the Nicaraguan territory generally referred to as Nicoya. The annexation of this territory that had no clearly defined boundaries brought Costa Rica's borders closer to the coveted shores of Lake Nicaragua. This usurped territory, together with Costa Rica's claim of shared sovereignty over the San Juan River, placed her in a strong position to claim rights over any canal route through this water system.

9. Nicaragua naturally opposed the annexation of her territory and insisted on the application of the principle of *uti possidetis iuris*. The situation was not settled and continued under constant discussion by both countries for the next 30 years.

10. (*circa* 1857) In 1856 Nicaragua was invaded and taken over by forces led by a United States military adventurer, General William Walker, who was working in concert with certain southern states of the United States that wanted to incorporate new territories into the American Union that would reinforce the south's position on such questions as slavery.

11. The invasion by the forces of Walker provoked the reaction of all the Central American nations against this foreign usurper who endangered the sovereignty and peace of the whole area. The war was bloody and destructive. It left Nicaragua completely prostrated. Costa Rica, whose army, apart from that of Nicaragua, had been perhaps the most important element in the defeat of Walker, was left after the war with military control over the San Juan River and parts of the great lake. The years after the war, 1857 and 1858, were filled with threats and negotiations in order to reach an agreement whereby Nicaragua would accept the annexation by Costa Rica of the Nicoya region and other claims of Costa Rica over the San Juan River.

12. The first of these efforts to reach an agreement was the signing of the Juarez-Cañas Treaty of 1857, towards the end of the war against Walker, whereby Nicaragua "as a sign of special gratitude to the Government of Costa Rica for the solid determination and great sacrifices made for the cause of national independence" recognized the annexation of Nicoya by Costa Rica and gave her rights of navigation with "articulos de comercio" ("articles of trade") on the San Juan River. In spite of the fact that this Treaty gave Costa Rica practically everything she had been claiming since independence, it was not ratified by Costa Rica. The reason was that Costa Rica was not willing to relinquish the military occupation of the San Juan River and the southern shores of the great lake since this possession gave her complete control of the water transit route. It was only after a declaration of war by Nicaragua against Costa Rica and the mediation of other Central American States that a final agreement was reached crystallizing in the signature of the Jerez-Cañas Treaty of Limits of 15 April 1858 which forms the backbone of the territorial rights of both States.

13. (*circa* 1885) During the next 30 years after the signing of the Treaty, it caused great resentment in Nicaragua that this Treaty had been signed under a cloud of duress. In order to avoid an extension of the dispute it was decided by means of the Arbitral Convention of 24 December 1886 that the differences should be submitted to arbitration. The sole arbitrator was the President of the United States, Grover Cleveland, who gave his Award on 22 March 1888.

14. The juridical implications of the question of the region of Nicoya and generally of the large and complex territorial issues that were laid to rest with the 1858 Treaty will be addressed by Mr. Brownlie, whilst the issues settled by the Cleveland Award will be explained by Professor McCaffrey.

(c) *Con objetos de comercio*

15. Professor Kohen has very kindly cited a section of a conference I delivered in the Nicaraguan Foreign Ministry on 26 August 1998 to an audience composed, among others, of the entire *corps diplomatique* accredited in Nicaragua and to which naturally the diplomatic representatives from Costa Rica were also invited.

16. Professor Kohen apparently did not read the text of this conference beyond the few words he quoted in his speech last Monday 2 March. He stated that: "L'agent du Nicaragua a

traduit en espagnol 'sous le rapport du commerce' comme signifiant 'para fines comerciales', ce qui signifie précisément 'con objetos de comercio'." (CR 2009/2, para. 37.) Although I do not find it particularly agreeable to quote myself, under the circumstances I will take the liberty of doing so in order to set the record straight. The paragraph from which the quote is taken is absolutely clear and admits of no misunderstanding even on a very cursory reading. It is the first paragraph in a section of the speech with the heading: "What are the rights of Costa Rica in the San Juan?", and the speech continues:

> "In the first place, the free navigation with commercial objects (con objetos de comercio). On this subject much has been said. The right of 'entirely free navigation' for commercial purposes — 'sous le rapport du commerce' — was established by the Congress of Vienna in 1815 for international rivers, that is, for those rivers that divide or flow through more than one state. This last is not the case of the San Juan since it is a river located entirely within one country."

17. The words I have just read are a free and literal translation of the Spanish text. As can be appreciated they say precisely the opposite of what Professor Kohen apparently understood it to mean. If Costa Rica considers that another translation would be appropriate I would invite them to provide a complete translation for the benefit of the Court.

II. DOMINIO Y SUMO IMPERIO

18. Costa Rica has shown a knack for giving special meaning to otherwise generally well understood concepts. For example, they do not call their security forces an army in spite of the fact that the Costa Rican armed forces under whatever name they are given are as numerous as the sum of the total armed forces of Nicaragua, a country that has more than twice the territorial extent and a nearly 50 per cent larger population than Costa Rica. These forces — which Costa Rica prohibits they be referred to as an army — are supplied with an annual budget that is nearly three times that of the total budget of the Nicaraguan armed forces, and roughly — as a matter of example — roughly twice over the amount budgeted for the Honduran armed forces which is a State with a territorial size and population similar to that of Nicaragua. The graph of this is on the screen. (CAG-2)

19. The word sovereign has also acquired a new meaning in Costa Rica's view. This repetition of the most significant point at issue — sovereignty — with a calculated disregard of its

significance is an incantation that constantly comes from the Costa Rican authorities. Thus Costa Rica repeats — and we have heard our Costa Rican colleagues do so in this Great Hall — that it respects and has never questioned Nicaragua's sovereignty over the San Juan River.

20. But what sovereignty are we talking about? If Costa Rica where to have the rights *she* claims over the river, then at most Nicaragua would simply be a co-sovereign with Costa Rica over the San Juan River. If Costa Rica has the right to navigate freely for any purpose, including the right to navigate with public vessels and armed patrols for any purpose and at any moment and Nicaragua does not have the right to regulate or police the river, then, I would like to know in normal Spanish meaning — or the English or French language we use in this Great Hall — what name or description we might give to a concept of "dominio y sumo imperio" that was carefully preserved in the Treaty exclusively and emphatically for Nicaragua?

21. The phrase "dominio y sumo imperio" used in the 1858 Treaty was a term of art well understood in Latin America in the nineteenth century. Perhaps the foremost authority on international law of the time in Latin America and certainly the best known publicist at the time of the signature of the 1858 Treaty was Don Andrés Bello. In his classic work "Principles of International Law" (p. 61) he stated:

> "Sovereignty, in so far as it disposes of things (property) is referred to as dominion and in so far as it enacts laws and regulations for persons is properly referred to as imperium . . . sumo imperium. Imperium applies to (befalls on) citizens or to foreigners." (La soberanía, que en cuanto dispone de las cosas se llama dominio, en cuanto da leyes y órdenes a las personas se llama propiamente imperio . . . El imperio recae ya sobre los ciudadanos, ya sobre los extranjeros.)

22. "Dominio y sumo imperio" referred then to the right and jurisdiction of a State to dispose of material things and to enact laws and regulations over persons. Therefore, if the "dominio y sumo imperio" of Nicaragua over the river meant anything at all to the signees of the Treaty in 1858, it was that Nicaragua could enact laws and regulations applicable on the river.

23. In the light of the above it is not possible to understand how Costa Rica can maintain that her rights of limited navigation with objects of commerce — which are simply economic rights — are on a par with the sovereignty — "dominio y sumo imperio" — of Nicaragua over the river.

Regulations to navigation

24. The regulations imposed by Nicaragua have been dismissed in a way that unfortunately has more of flippancy and impugnment of Nicaragua's motives than of legal argument or objective description. Perhaps this is due to the fact that our colleagues apparently have never visited the area in dispute. This might explain certain remarks that seem to stem from a misconception that the San Juan River is comparable to the Rhine River. Thus, jokes on the existence of crocodiles and other such dangers in the river could only be expressed by someone who has not travelled in the area. Perhaps that is why our native Costa Rican colleagues were careful to avoid some of these statements. They would know also that only someone disconnected with the realities of the area and its poverty could lightly suggest for example that the problem of navigating by night could be easily solved by placing lights along the river course and mandating night lights for the small sailing craft that navigate those waters.

25. The main point at issue is the Nicaraguan right of regulating the navigation on the river and of enforcing these regulations and this has not been seriously, directly and openly put into question. This is understandable. If the right to impose and enforce regulations by the dominus, the holder of the "dominio y sumo imperio", the sovereignty over the river, are called into question, then we would logically be faced with a situation where the river course would be a no man's land — unless of course, it was claimed that the holder of the economic rights of navigation with objects of commerce along the river has also, by a process of osmosis, acquired jurisdiction over these waters.

26. To conclude this point, it is indisputable that Nicaragua has the right to regulate navigation on the San Juan River and enforce the regulations and therefore the only possible question that might be discussed is the reasonableness of these regulations.

Central American Court

27. The position of Nicaragua is that the only treaty in force that governs the territorial issues between Nicaragua and Costa Rica is the Jerez-Cañas Treaty of 1858 and the only legal instrument accepted and authorized by both Parties to interpret this Treaty is the Cleveland Award of 1888. Nicaragua also considers as pertinent the five awards rendered between September 1897 and March 1900 by General Alexander who was the arbitrator selected by President Cleveland for

conducting the demarcation of the territory of both States on the basis of the 1858 Treaty and the 1888 Award.

28. Costa Rica has in recent years added a judgment rendered by the Central American Court of Justice in 1916 as a pertinent instrument on the question of Costa Rica's rights of limited navigation in the San Juan River. This judgment resolved a dispute that had arisen in relation to a treaty by which Nicaragua granted the United States an option for cutting a canal through Nicaragua — the Chamorro-Bryan Treaty of 1914. It is manifest on reading this judgment that the Central American Court had no intention of enlarging or curtailing the rights established in the 1858 Treaty and the 1888 Award. This judgment was not considered by Costa Rica or Nicaragua at the time it was rendered as interpreting or defining the rights of Costa Rica to freedom of navigation with objects of commerce as established in Article VI of the 1858 Treaty or the 1888 Award and was never invoked by Costa Rica in this connection during the period from 1916 to 1998. The first time it was so invoked was in 1998 after the dispute arose that is now before the Court.

III. PRIOR CASE AGAINST COSTA RICA IN THE INTERNATIONAL COURT OF JUSTICE

29. It has been asserted by our distinguished Costa Rican colleagues that this is the first time that Costa Rica is before this Court. This is not entirely correct. Nicaragua filed a case against Costa Rica in this Court on 28 July 1986, the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and on that occasion the Agents of Costa Rica and Nicaragua were the same persons who are now acting as Agents in the present procedures. This case was subsequently discontinued by Nicaragua, and the Court, after ascertaining the views of Costa Rica, ordered the removal of the case from the List on 19 August 1987.

30. The reason for bringing this case to the attention of the Court is due to the fact that Costa Rican counsel has asserted that during the 1980s when the Sandinista Government was in office in Nicaragua, Cost Rica was forced to abandon the river because of the military operations then under way. As is well documented in the Memorial filed by Nicaragua in that case on 10 August 1986, the river and border areas were not abandoned because of the military conflict but were voluntarily turned over by the Costa Rican Government to the insurgents known as "contras".

Apart from the Nicaraguan Memorial and Annexes just cited, the question is well documented in the public records of the United States that are now available to the public and also in many books, interviews and affidavits subsequently made public by the participants of those unfortunate events in the 1980s.

IV. ISSUES IN DISPUTE THAT ARE NOT BEFORE THE COURT

31. The dispute before the Court is one that the Government of Nicaragua considers could have and should have been amicably settled without having recourse to these proceedings. What is at present concretely at issue is not that Nicaragua has not allowed Costa Rica to navigate on the San Juan River but that Costa Rica contends that it has the right to do so entirely freely with all type of vessels, except perhaps aircraft carriers and dreadnoughts which could not in any event fit on a river as narrow and shallow in parts as the San Juan, and that this freedom is not subject to any regulations by Nicaragua. It is well documented that Nicaragua in the past has always been amenable to facilitate the transit of even public vessels by Costa Rica if they complied with simple regulations that any sovereign is entitled to demand. Also, it is well documented that Nicaragua has not even prohibited tourists from visiting the river on Costa Rican vessels as long as they comply with the normal regulations. The economic implications of these regulations are so irrelevant that the yearly revenues received from their implementation by Nicaragua, including visas or tourist cards and charges for services rendered for the security and welfare of navigation along the river, would not cover the expenses for the Parties of one hour of the pleadings presently before the Court.

32. On the other hand, there are more vital issues at stake involving the question of the river. Thus, the river is being heavily polluted and silted through Costa Rican operations. If our Costa Rican colleagues kept abreast of the newspapers and other media of Costa Rica, they would be aware that one of the main news items is the fact that Costa Rica has recently authorized the operation of a gold mine in the vicinity of the San Juan River that runs serious risks of polluting the river with cyanide.

33. Another vital question is that at present almost 90 per cent of the waters of the San Juan River flow out to sea through the Colorado River in Costa Rica leaving merely a largely

unnavigable trickle of water on the side of Nicaragua, as can be appreciated on the screen (see slide on screen: CAG-3) For practical purposes, Costa Rica is the only one able to use the river to navigate out to sea.

34. If these issues involving the river were fully before the Court, we would be arguing that Costa Rica not only in reality is claiming full modern sovereignty over the San Juan, but in fact a feudal type of sovereignty that would allow it the right to use and abuse the river: pollute, diminish and divert the waters of the river.

35. Other very important issues stemming from the 1858 Treaty are still in dispute between the Parties and involve, for example, the situations of the Bays of San Juan and Salinas. Since assertions have been made on these questions during the present hearings, Nicaragua leaves on record that it reserves its rights on all questions relating to these issues.

36. And finally, another highly important territorial issue that was naturally not dealt with in the 1858 Treaty is still pending of resolution: the maritime delimitation both in the Atlantic and the Pacific.

37. Instead of these major issues which demand settlement and require the engaged co-operation of the Parties, which Nicaragua is prepared to contribute, the only issues before the Court are those narrow ones carefully selected by Costa Rica.

V. EXTEMPORANEOUS PRODUCTION OF NEW DOCUMENTS

38. The present case has been amply documented and argued in the two rounds of written pleadings that have preceded this public hearing. Costa Rica was even allowed what in fact amounts to a further round of written pleadings by filing on 27 November 2008 a letter and documents containing arguments addressed to the Rejoinder that had been filed four-and-a-half months before by Nicaragua on 15 July 2008. The Court decided to authorize this late production and Nicaragua was notified of this decision on 18 December 2008. Nicaragua was not amenable to this extemporaneous presentation of documents and affidavits that could have been produced during the written pleadings. In fact, the four-and-a-half months elapsed between the filing of Nicaragua's Rejoinder and the production of these documents and arguments corresponds closely to the six months allotted to Nicaragua for the preparation and filing of her entire Rejoinder.

39. With respect to the substance of these new documents produced by Costa Rica, it is our position that, in any event, they do not erode or diminish in any way the arguments of Nicaragua. Quite the contrary, as will be explained by Professor Remiro and Mr. Reichler in their respective pleadings, they reinforce our position.

40. Mr. President, Members of the Court, in this speech I have tried to keep apace with the flavour of the Costa Rican comments, including their esteemed counsel. In evaluating our oral presentation, I am confident you will bear in mind that Costa Rica has had the benefit of more than eight months since the filing of our Rejoinder to prepare the text of this oral pleading whilst we have had only a matter of a couple of days to prepare our response. In this short period of time we might not be able to address every point made by Costa Rica and in this regard we reserve our rights and maintain the positions expressed in our written pleadings.

41. Mr. President, Members of the Court, the subsequent presentation of the Nicaraguan oral pleadings will be as follows: during today's hearing, Mr. Ian Brownlie will address "The special character of the treaty", Professor Antonio Remiro will then rebut the Costa Rican argument based on the right of free navigation "con objetos de comercio" and finally Professor Alain Pellet will continue with the interpretation of the Treaty.

During tomorrow's hearing, Mr. Paul Reichler will address the legitimacy and lawfulness of Nicaragua's regulations and other rights. Professor Stephen MacCaffrey will continue with: Non-commercial navigation by public vessels. Mr. Reichler will rebut Costa Rica's alleged rights of protection, custody and defence of the San Juan. And finally Professor Pellet will close the presentation addressing the issue of the Remedies.

Mr. President, Members of the Court, thank you for your kind attention. And now may I ask you that you call Mr. Brownlie.

The PRESIDENT: I thank the Agent of Nicaragua, Dr. Carlos Argüello Goméz, for his statement. I now invite Mr. Ian Brownlie to take the floor.

Mr. BROWNLIE:

1. Thank you, Mr. President. Mr. President Members of the Court, it is, once again, my privilege to represent the Republic of Nicaragua in front of this distinguished Court.

THE SPECIAL CHARACTER OF THE TREATY

2. In this case my particular responsibility is to investigate the historical background of the Treaty of Limits of 1858 and to confirm its special character as a treaty designed specifically to settle a territorial dispute. This examination of the character of the 1858 Treaty as a boundary treaty is necessary for two reasons: first, to assist the Court in the interpretation and application of the Treaty in the special circumstances of the case and, secondly, to rebut the efforts of Costa Rica to distort the character of the dispute.

3. In the view of Costa Rica the San Juan has the character of an international river and thus the rules of general international law relative to navigation on international waterways are applicable. And thus in her Memorial Costa Rica gives prominence to the case of *Territorial Jurisdiction of the International Commission of the River Oder* (MCR, p. 155), which reflects a legal framework unrelated to the situation now in front of the Court.

4. In this context the pleadings presented on behalf of Costa Rica are bound to recognize that the San Juan is a part of Nicaragua. In fact the Treaty of 1858 establishes "the boundary line between the two Republics", as described in clear terms in Article II. And of course Article VI provides: "The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan River from its origin in the Lake to its mouth in the Atlantic . . ."[1]

5. Consequently, from time to time Costa Rica expressly recognizes that the framework of the dispute is the Treaty of 1858. The Memorial accepts the centrality of Article VI of the Treaty — this in Chapter 2, paragraph 2.25. And the Reply of Costa Rica recognizes the primacy of the Treaty of 1858 in several passages. Thus, our opponents state that:

> "The parties agree that the case is primarily governed by the 1858 Treaty and the 1888 Cleveland Award, that Award confirming Costa Rica's right to sail vessels in the lower part of the San Juan 'for purposes of commerce' and its right to sail public vessels in connexion with such navigation."[2] (Reply, para. 2.08.)

And, also in the Reply we find:

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[1] The English translation used is the translation submitted by Nicaragua to President Cleveland, MCR, Vol. 2, p. 54. ["La République du Nicaragua aura le *dominium* et l'*imperium* exclusifs sur les eaux du fleuve San Juan de son origine dans le lac jusqu'à son embouchure dans l'océan Atlantique . . ."]

[2] ["Les parties conviennent que l'instance est régie principalement par le traité de 1858 et la sentence arbitrale Cleveland de 1888, sentence qui a confirmé le droit du Costa Rica de faire naviguer sur le cours inférieur du San Juan aux fins du commerce » et de naviguer avec des bateaux officiels dans l'exercice de ce droit de navigation."]

> "Costa Rica, mindful of the importance of maintaining peaceful relations with all countries, especially its neighbours, has never sought a revision of the Cañas-Jérez Treaty but has limited itself to asking for what it was entitled to under that Treaty, no more and no less. Costa Rica can make do with the Treaty as it is, provided it is interpreted fairly and objectively. What it cannot accept is Nicaragua's insistence on being allowed to give the 'perpetual right of free navigation' stipulated by the Treaty the meaning that best serves Nicaragua's own interest, subordinating Costa Rica's right to Nicaragua's sovereignty over the waters of the River."[3] (Reply, para. 2.32.)

6. The central question is this. The space occupied by the San Juan is a part of the territory of Nicaragua and this is not only the legal outcome of drawing a boundary but the significant legal and political consequence of a territorial settlement validated by the Treaty.

7. The fixing of the boundary in this case, including the delimitation arrangements in Article III, must surely engage the elements of public order formulated by this Court in the Judgment in the *Temple of Preah Vihear* case. The Court observed:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious."[4] (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34.)

8. In the present case, the analogy with the *Temple of Preah Vihear* case arises not from the line of the boundary as such but from the danger of permitting a régime of navigation which would introduce an element of legal porosity and instability into the otherwise lucid attribution of territory.

9. The standard rule of interpretation is of course confirmed in Article 31 of the Vienna Convention which in essentials provides as follows:

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[3] ["Costa Rica — conscient de l'importance du maintien de relations pacifiques avec tous les pays et notamment ses voisins — n'a jamais sollicité une révision du traité Cañas-Jérez, mais s'est contenté de revendiquer les droits qui lui ayant été reconnus par cet instrument, ni plus ni moins. Le Costa Rica peut s'accommoder du traité en état, à condition que celui-ci soit interprété équitablement et objectivement. Ce qu'il ne peut pas accepter est l'insistance du Nicaragua à conférer au 'droit perpétuel de libre navigation' — stipulé dans le traité — le sens qui sert le mieux les intérêts de ce pays et la subordination du droit du Costa Rica à la souveraineté nicaraguayenne sur les eaux du fleuve."]

[4] ["D'une manière générale, lorsque deux pays définissent entre eux une frontière, un de leurs principaux objectifs est d'arrêter une solution stable et définitive. Cela est impossible si le tracé ainsi établi peut être remis en question à tout moment, sur la base d'une procédure constamment ouverte, et si la rectification peut en être demandée chaque fois que l'on découvre une inexactitude par rapport à une disposition du traité de base. Pareille procédure pourrait se poursuivre indéfiniment et l'on n'atteindrait jamais une solution définitive aussi longtemps qu'il resterait possible de découvrir des erreurs. La frontière, loin d'être stable, serait tout à fait précaire."]

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[5]

In addition, Article 32 provides:

> "Recourse may be had to supplementary means of interpretation, *including the preparatory work of the treaty and the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of Article 31, [and] to determine the meaning when the interpretation according to Article 31 [either]:
>
> *(a)* leaves the meaning ambiguous or obscure; or
>
> *(b)* leads to a result which is manifestly absurd or unreasonable."[6] (Emphasis added.)

10. And Nicaragua would point out that the Court has found it helpful to rely on the criterion of giving effect to the object and purpose of a treaty in at least 12 Judgments since 1986.

11. The centrality of this criterion was emphasized in the Report of the International Law Commission to the General Assembly in 1966, where it is stated:

> "*Paragraph 1* contains three separate principles. The first — interpretation in good faith — flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. *The third principle is one both of common sense and good faith: the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose*. These principles have repeatedly been affirmed by the Court."[7] (*Yearbook of the International Law Commission (YILC)*, 1966, II, p. 221.)

12. The evidence of the object and purpose of the Treaty of 1858 must be sought first in the title and the text of the Treaty itself. The title of the Treaty in English is the "Treaty of Limits between Costa Rica and Nicaragua".

13. The preamble forms a part of the context of a treaty, and this is specified in paragraph 2 of Article 31 of the Vienna Convention. And the Court has had recourse to the statement of the

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[5] ["1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but."]

[6] ["Il peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu, en vue, soit de confirmer le sens résultant de l'application de l'Article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'Article 31:

a) laisse le sens ambigu ou obscur ; ou

b) conduit à un résultat qui est manifestement absurde ou déraisonnable."]

[7] ["Le paragraphe 1 contient trois principes distincts. Le premier — celui de l'interprétation de bonne foi — découle directement de la règle *pacta sunt servanda*. Le deuxième constitue le fond même de la méthode de référence au texte : les parties sont présumées avoir l'intention qui ressort du sens ordinaire des termes qu'elles utilisent. Le troisième principe a trait à la fois au bon sens et à la bonne foi ; le sens ordinaire d'un terme doit être déterminé non pas dans l'abstrait, mais dans le contexte du traité et compte tenu de son objet et de son but. La Cour a réaffirmé ces principes à de nombreuses reprises."]

object and purpose of the treaty in the preamble in the process of interpretation. Thus in the *South West Africa* cases the Court referred to the preamble of the instrument of Mandate of South West Africa as evidence of the best method of giving practical effect to the international régime proposed in Article 22 of the League Covenant (see *I.C.J. Reports 1966*, p. 24, para. 21). Similarly, in the *Beagle Channel Arbitration* the Award took careful account of the content of the preamble (see *International Law Reports (ILR)*, Vol. 52, p. 93, pp. 132-134; Award of 18 February 1977).

14. The preamble to the Treaty of Limits provides a clear confirmation of the object and purpose of the agreement. It says:

> "We, Maximo Jerez, Minister Plenipotentiary of the Government of the Republic of Nicaragua, and José Maria Cañas, Minister Plenipotentiary of the Government of the Republic of Costa Rica, *having been entrusted by our respective Governments with the mission of adjusting a treaty of limits between the two Republics, which should put an end to all the differences which have obstructed the perfect understanding and harmony that must prevail among them for their safety and prosperity*. . . have agreed to and adjusted the following Treaty of Limits between Nicaragua and Costa Rica." (Emphasis added.)

15. Thus the explicit purpose of the two Governments was to conclude a "Treaty of Limits between Nicaragua and Costa Rica".

16. The provisions of the Treaty, both in their individual content and in their sequence, give priority and emphasis to the business of establishing a boundary line. Article I explicitly indicates the historical background in the reference to "differences about boundaries", and the need to proceed to the consolidation of "peace, happily re-established".

17. Article II is devoted to the establishment of the boundary line as follows — I will not read all of Article II; it will appear in the transcript. The beginning of Article II is as follows:

> "The dividing line *[the dividing line]* between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo, said distance to be measured between the exterior works of said castle and the above-named point."

And then the various stages are then set forth:

> "From here, and taking the said works as centre, a curve shall be drawn along said works, keeping at the distance of three English miles from them, in its whole length, until reaching another point, which shall be at the distance of two miles from the bank of the river on the other side of the castle. From here the line shall continue in the direction of the Sapoá river, which empties into the Lake of Nicaragua, and it

> **shall follow its course, keeping always at the distance of two miles from the right bank of the San Juan river all long its windings, up to reaching its origin in the lake; and from there along the right shore of the said lake until reaching the Sapoá river, where the line parallel to the bank and shore will terminate."**

And finally, Article II provides:

> "From the point in which the said line shall coincide with the Sapoá river — a point which, according to the above description, must be two miles distant from the lake — an astronomic straight line shall be drawn to the central point of the Salinas Bay in the Southern Sea, where the line marking the boundary between the two contracting Republics shall end."

18. Articles III, IV and V are concerned with the legal status of particular locations relating to the boundary. Following these four Articles involving a territorial division, Article VI forms part of the overall settlement — it forms part of the overall settlement — of the differences which resulted in the war of 1857 and provides as follows:

> "*The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic*; but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce (objetos de comercio) either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiqui, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica. The vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments." (Emphasis added.)

19. In this passage, the words "for the purposes of commerce" are not accepted by Nicaragua as an accurate translation into English. The first element in this provision concerns "exclusively the dominion and sovereign jurisdiction (exclusivamente el dominio y sumo imperio) over the waters of the San Juan River". This is the primary principle and the reference to navigation is logically a secondary element.

20. The provisions of Article VII emphasize the general purpose of the Treaty, as the creation of a "territorial division". Thus Article VII provides that:

> "It is agreed that the territorial division made by this Treaty cannot be understood as impairing in any way the obligations contracted whether in public treaties or in contracts of canalization or public transit by the Government of Nicaragua previous to the conclusion of the present treaty; on the contrary, it is understood that Costa Rica assumes those obligations, as far as the portion which corresponds to its territory is concerned, without injury to the eminent domain and sovereign right which it has over the same."

21. So much for the title, the preamble and the provisions of the Treaty. I now move to the historical context of the Treaty of Limits of 1858 as cogent evidence of its object and purpose.

The historical context of the Treaty of Limits of 1858 as cogent evidence of its object and purpose

22. The historical context of the Treaty of Limits is established by the events of 1824, which resulted in the annexation by Costa Rica of the large region of Nicoya — I refer now to graphics IB-1 and IB-2 in the judges' folders of this morning.

23. So, if we introduce the graphics, they show the location and extent of the Region of Nicoya prior to the 1858 Treaty. The first item is the *Geographical Map of the Republic of Nicarágua* by Fermin Ferrer, Governor of the Western Department. This was probably prepared by the cartographer Maximiliano von Sonnenstern. This map shows a pecked straight line starting in the west — it is not very easy to see, but it may be better on the page — at the head of the Gulf of Nicoya — that is on the western side — then eastwards to meet the Caribbean Sea.

The second graphic is a sketch-map which indicates in green coding the extent of Nicoya as shown on the first graphic, but in the absence on the first graphic of a colour coding.

Mr. President, the significant fact is that Costa Rica annexed the Region of Nicoya in 1824 and this change in the status quo was recorded in the legislation of Costa Rica in 1825 (MCR, Anns., Vol. 6, Ann. 193).

24. These purported changes were reflected in the Constitutions of Costa Rica in the post-independence period, but were not accepted by Nicaragua. If we look at the words of the Memorial of Costa Rica:

> "At this time the principal territorial issue between Costa Rica and Nicaragua concerned the latter's claim to the Nicoya peninsula on the Pacific coast. In 1824 the people of Nicoya opted by plebiscite to become part of Costa Rica, a decision approved by decree of the Central American Federal Congress on 9 December 1825."[8] (MCR, p. 12, para. 2.14.)

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[8] "A cette époque, le principal problème territorial entre le Costa Rica et le Nicaragua concernait la revendication de ce dernier sur la péninsule de Nicoya, sur la côte pacifique. En 1824, les habitants de Nicoya choisirent par plébiscite de faire partie du Costa Rica, une décision approuvée par décret du congrès fédéral d'Amérique centrale le 9 décembre 1825."

25. The legislation of the Central American Federal Congress of 1825 cited in this passage appears in the Annexes of the Reply of Costa Rica (Vol. 2, Ann. 5). The text makes clear that the allocation of Nicoya was provisional and thus Article 1 provides:

> "For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made, the district of Nicoya shall CONTINUE to be separated from Nicaragua and annexed to Costa Rica."[9]

26. This element of provisionality can be seen in the text of other Constitutions of Costa Rica in the relevant period, namely:

— The Constitution of 1844, in Article 47 (Memorial of Costa Rica, Vol. 2, Ann. 195); and

— The Constitution of 1847, in Article 25 (Memorial of Costa Rica, Vol. 2, Ann. 196).

27. The overall assessment of these developments by Costa Rica is that in the post-independence period from 1821 to 1856 "the principal territorial issue between Costa Rica and Nicaragua" related to the Region of Nicoya and this is the position stated in the Memorial. And the Memorial expressly recognizes that: "This situation was not finally accepted by Nicaragua until the Treaty of Limits of 1858." (MCR, p. 12, para 2.14.)

28. In her Counter-Memorial, Nicaragua points out that the annexation of Nicoya in 1824 involved a challenge to the principle of *uti possidetis*, and to the colonial boundaries at the time of independence (CMN, pp. 16-17, paras. 1.2.2-1.2.3; pp. 21-25, paras. 1.2.13-1.2.23).

29. It is the position of Nicaragua that the San Juan de Nicaragua River belonged exclusively to the Province of Nicaragua from 1573. It is also the position of Nicaragua that the status of Nicoya was not determined until the Treaty of Limits of 1858.

30. In 1857 Nicaragua negotiated the Juarez-Cañas Treaty with Costa Rica (MCR, Vol. 2, Ann. 5). This Treaty was not ratified by Costa Rica but it provides a precedent for the settlement of 1858. The purpose of the Juarez-Cañas Treaty was precisely to bring about a settlement of the Nicoya dispute. Thus the first Article provides:

> "First: The Government of Nicaragua, as a sign of gratitude for the Government of Costa Rica, for its good offices on behalf of the Republic, for the solid determination and great sacrifices made for the cause of national independence, waives, takes and puts away every right on the District of Guanacaste, [another name

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[9] "Pour l'instant et jusqu'à ce que la démarcation du territoire de chaque État, telle qu'elle est prévue par l'Article VII de la Constitution, soit effectuée, le district de Nicoya CONTINUERA à être séparé du Nicaragua et annexé au Costa Rica."

> for the area of Nicoya] which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the sovereign jurisdiction of said Government."[10]

31. For reasons of pure political opportunism, the 1857 Treaty was not ratified by Costa Rica. The opportunism took the form of the signing of a concession with William Webster on 14 July 1857 purporting to grant rights for the business exploitation of the interoceanic transit route that passed entirely through Nicaraguan territory.

32. As part of her strategy to seize the transit route, Costa Rica presented an ultimatum to Nicaragua on 14 October 1857 to hand over the port of San Carlos on Lake Nicaragua (CMN, Ann. 22).

33. This demand was treated by Nicaragua as a declaration of war and the Nicaraguan Government issued the following Decree dated 19 October 1857:

> "Art. 1. Nicaragua accepts the war declared by the Government of Costa Rica and will vindicate its rights which have been deliberately violated by the conduct of that Government.
>
> Art. 2. The Republic of Nicaragua will protect and preserve its rights along the entire transit route, from San Juan del Norte, through the river and lake to San Juan del Sur, as well as the rights it has in the district of Guanacaste [again, that is another name for Nicoya], including its lands, forests and rivers.
>
> Art. 3. The necessary force will be organised to execute the provisions of this decree."[11] (CMN, Ann. 57.)

34. The outcome of the new conflict and the military occupation of Nicaraguan territory by the Costa Rican army was that Nicaragua was coerced into accepting a very unfavourable treaty of peace. This was the Martinez-Cañas Treaty concluded on 8 December 1857 (MCR, Vol. 2, Ann. 6). Among various provisions drafted in favour of Costa Rica, Article VIII purported to determine the boundaries of the district of Nicoya.

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[10] "Premièrement: Le Gouvernement du Nicaragua, en signe de gratitude envers le Gouvernement du Costa Rica pour ses bons offices en faveur de la République, pour sa ferme détermination et pour les grands sacrifices qu'il a consentis pour la cause de l'"indépendance nationale, renonce à tout droit sur le district de Guanacaste, maintenant appelé province de Moracia de la République du Costa Rica, qui doit désormais être considérée et reconnue comme faisant partie intégrante de ladite République, sous la juridiction souveraine dudit Gouvernement."

[11] "Article 1. Le Nicaragua accepte la guerre déclarée par le Gouvernement du Costa Rica et fera valoir ses droits qui ont été délibérément violés par la conduite de ce Gouvernement.

Article 2. La République du Nicaragua protégera et préserva ses droits le long de toute la ligne de transport, de San Juan del Norte en passant par le fleuve et le lac jusqu'à San Juan del Sur, ainsi que les droits qui sont les siens dans le district de Guanacaste, dont ses terres, ses forêts et ses rivières.

Article 3. La force nécessaire sera organisée pour mettre en œuvre les dispositions du présent décret."

35. Fortunately, the forms of duress which led to the signature of the Martinez-Cañas Treaty — that is, the intervention of the filibusters led by William Walker — also brought about the withdrawal of the Costa Rican army of occupation. These developments enabled Nicaragua to resume control of the San Juan River and to repudiate the imposture of the Martinez-Cañas Treaty. This repudiation was in January 1858 and in April of the same year Nicaragua was able to negotiate the Treaty of Limits which is now before the Court.

36. The historical context is described by an authoritative and independent source, in the form of the Rives Report.

37. As the Court will recall, in the arbitration conducted by President Cleveland, he empowered Mr. George L. Rives, Assistant Secretary of State to examine the arguments and evidence and to prepare a report to the President.

38. The negotiating history of the 1858 Treaty is described in the Report, dated 2 March 1888, and the significance of boundary disputes is confirmed in the following passages. Referring to the dissolution of the Federal Republic of Central America in 1838, Mr. Rives observes:

> "But with the establishment of the Federal Republic, and still more, with the dissolution, the questions of boundary began to assume importance.
>
> The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.
>
> In 1838 Costa Rica seems to have urged upon Nicaragua — then assuming the rank of an independent State upon her withdrawal from the Federation — a desire for a recognition of the annexation of Nicoya. In 1846, 1848 and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years."[12] (CMN, Ann. 70.)

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[12] Mais lors de l'instauration de la République fédérale et plus encore, lors sa dissolution, les questions de frontières ont commencé à prendre de l'importance.

Il semble que dans son Article VII, la Constitution fédérale prévoyait d'instaurer une démarcation, entre chaque Etat, mais rien n'a été fait en ce qui concerne le tracé de la ligne entre le Costa Rica et le Nicaragua.

En 1828, le Costa Rica semble avoir fait part au Nicaragua — alors que celui-ci accédait au statut d'Etat indépendant après son retrait de la fédération de son souhait de voir reconnue l'annexion de Nicoya. En 1846, 1848 et 1852, d'autres négociations infructueuses ont été tentées en vue de délimiter la frontière ; en 1858, lors de la signature du traité de limites, la question avait, sous une forme o sous autre, préoccupé les deux gouvernements depuis au mois deux décennies.

39. The report by Rives refers to the desire of Costa Rica for recognition of the annexation of Nicoya, and this must emphasize the fact that the issue of the title remained open. If Nicoya was already part of Costa Rica, why would recognition be needed?

The diplomatic correspondence subsequent to the conclusion of the Treaty of 1858

40. The diplomatic correspondence emerging over a long period stands as witness to the role of the 1858 Treaty as a treaty of peace and as a treaty aimed at the settlement of a specific territorial dispute. The documents of the period 1870 to 1886 reveal a major paradox. The price of the peace settlement had been high for Nicaragua because she had agreed to the attribution of a large tract of her territory to Costa Rica.

41. This substantial territorial concession by Nicaragua was recognized by interested third parties. Reporting to the Secretary of State on 28 May 1858, the United States Resident Minister to the Governments of Costa Rica and Nicaragua, Mirabeau B. Lamar, observed:

> "In my despatch, dated 28 April 1858, I mentioned that President Martinez had proceeded to Rivas to meet there President Mora, of Costa Rica, for the purpose of settling the question of Boundary between the two Republics. On the return of the President to Managua, the acting minister of Foreign Affairs addressed me a note (No. 1) enclosing a copy of the official Gazette, which, he said, would inform me of the happy results of the interview between the two Presidents at Rivas. I send herewith a copy of said Gazette and also my note (No. 2) — in reply to the Minister's. You will find in the Gazette a Treaty of limits between the two Republics, by which it appears that Nicaragua has conceded all that Costa Rica demanded and probably more than she ever expected to obtain. Under this Treaty Costa Rica now claims all Guanacaste, [that is, Nicoya] and the right bank of the San Juan, from three miles below Old Castillo, to the mouth of the river, including Punta Arenas. This concession was made as an inducement to Costa Rica to enter into another Treaty of alliance defensive and offensive against the Filibusters."[13] (CMN, Vol.2, Ann. 25.)

42. As early as 1870 the Government of Nicaragua had complained to Costa Rica of the cession of a large portion of territory and had raised the issue of the validity of the Treaty of Limits (MCR, Vol. 3, Ann. 30).

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[13] Dans ma lettre, en date du 28 avril 1858, j'ai indiqué que le président Martinez s'était rendu à Rivas pour s'y réunir avec le président Mora, du Costa Rica, afin de régler la question des limites entre les deux républiques. Au retour du président à Managua, le ministre des affaires étrangères par intérim m'a remis une note (nº2) — à laquelle était joint un exemplaire du journal officiel, qui m'a-t'il-dit, me mettrait au courant des heureux résultats de la réunion entre les deux président à Rivas. Vous trouverez ci-joint un exemplaire dudit numéro du journal officiel ainsi que de la note (nº3) par laquelle j'ai répondu au ministre. Vous verrez dans le journal officiel ci-joint le texte d'un traité de limites entre les deux républiques, dont il ressort que le Nicaragua a accordé au Costa Rica tout ce qu'il demandait, voire, probablement, plus que ce à quoi il ne s'est jamais attendu. En vertu de ce traité le Costa Rica réclame actuellement Guanacaste tout entier, et la rive droite du fleuve San Juan, depuis 3 milles au-dessous de Castillo Viejo jusqu'à l'embouchure du fleuve, y compris Punta Arenas. Cette concession a été accordée dans le but d'amener de Costa Rica à conclure un autre traité d'alliance, défensive et offensive contre les flibustiers.

43. The correspondence on the theme of the validity of the Treaty continued until the Agreement relating to the arbitration of President Cleveland in 1888. I refer to the Nicaraguan Note of 3 August 1886 and the response of Costa Rica dated 31 August 1886 (MCR, Vol. 3, Anns. 32 and 34).

44. In summary, the diplomatic materials confirm two significant elements in the political picture. The first is the essential character of the 1858 Treaty as a treaty of peace and boundaries. And the second, the secondary issue, which appeared subsequent to its conclusion, that of the validity of the Treaty.

45. This issue was, of course, the legal side of the Nicaraguan realization of the magnitude of the territorial cession which the Treaty had entailed. The general character of the Treaty of 1858 is to a great extent recognized in the Costa Rican Reply. And there we find:

> "The present case is not one in which one or more riparian States decide to set up a particular fluvial regime, granting rights to other riparians or even to non-riparians. On the contrary, [this is Costa Rica], *this case concerns a treaty which settled a dispute with regard to sovereignty over the frontier areas of both countries, including over the San Juan River, recognising the sovereignty over the waters and one bank to one of the riparian States*, and granting a perpetual right of free navigation for purposes of commerce to the other. One attribution (Nicaraguan sovereignty) is inseparable from the other (Costa Rican navigation): the condition for the acceptance of the first was the acceptance by the other party of the second."[14] (RCR, p. 39, para. 2.69; emphasis added.)

46. Mr. President, this formulation goes some way to a fair analysis, but to equate the grant of sovereignty with the right of free navigation for certain purposes involves an opposition which is flawed in two respects.

47. First, in legal terms the right of navigation is necessarily subordinate to the grant of sovereignty.

48. And, secondly, in terms of the contractual architecture, the sovereignty granted to Nicaragua *in respect of the river* was a modest recompense for the cession of the extensive territory of Nicoya.

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[14] La présente instance ne concerne pas l'établissement par un ou plusieurs Etats riverains, d'un régime fluvial particulier dans le cadre duquel des droits seraient accordés à d'autres riverains ou même à des non-riverains. Bien au contraire, la présente affaire concerne un traité qui réglait un différend relatif à la souveraineté sur les zones frontalières des deux Etats, y compris sous le fleuve San Juan, en reconnaissant la souveraineté sur les eaux et sur une rive du fleuve de l'un des Etats riverains et en octroyant un droit perpétuel de libre navigation aux fins du commerce à l'autre. L'attribution de l'un des droits (la souveraineté au Nicaragua) est inséparable de l'autre (la navigation au Costa Rica) : la condition d'acceptation de la première était l'acceptation par l'autre partie de la seconde.

The primary object and purpose of the 1858 Treaty as a treaty of limits: the legal consequences

49. And so the primary object and purpose of the 1858 Treaty is to create a boundary régime, a bilateral system of peace and good order. No rights are created for third States.

50. In this very specific geographical and historical milieu, recourse to principles of general international law relating to typologies of watercourses cannot be justified. In particular, there is no legal justification for generalizing from European treaty practice.

51. In the first place Latin American doctrine and practice is to the effect that there is no general right of freedom of navigation in the region, in the absence of special agreement. This is the opinion of Professor Caflisch expressed in his Hague lectures after reviewing a considerable quantity of material (*Recueil des cours*, Vol. 219 (1989, VII), p. 125). And there it is said this authority describes the doctrine as almost unanimous.

52. Moreover, the Department of State — the United States Department of State — *Digest of International Law*, edited by Dr. Marjorie Whiteman, under the side note *American rivers*, reports the leading Chilean authority as follows:

> "At the Barcelona Conference, the Chilean publicist, Alejandro Alvarez, in his report as chairman of the subcommittee on navigable waterways, noted:
>
>> 'The principle of freedom of navigation on rivers has not evolved in the same manner in the American Continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but as a concession accorded voluntarily by the riparian States through the medium of *inter partes* agreements or of legislative acts . . .' (League of Nations, Barcelona Conference, *Verbatim Records and Texts Relating to the Convention on the Regime of Navigable Waterways of International Concern* (Geneva, 1921) p. 225-226.)"
>
> (*Digest of International Law*, Vol. 3, Department of State, Publication No. 7737, released October 1964, p. 881.)

53. Quite apart from the position in the Latin American doctrine and practice, our opponents contend that the right of navigation referred to in the 1858 Treaty is in some sense absolute or peremptory (RCR, paras. 3.13-3.25). This extravagant opinion appears to be related to general international law, but it lacks any foundation either in contemporary general international law of the nineteenth century or in regional doctrine and practice.

54. It is the position of Nicaragua, expressed in the Reply, that Nicaragua has a power of regulation consistent with the provisions of Article VI of the Treaty of 1858.

55. The well known authority of the nineteenth century, Wheaton, makes the following statement of principle:

> "Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectualty secured by mutual convention regulating the mode of its exercise." (Wheaton, *Elements of International Law*, 1866, Part II, Chap. IV, Sect. 193.)

56. It is not suggested that this reasoning is directly applicable to the present case, especially in view of the fact that the right of navigation presently in issue arises from a bilateral treaty. However, the significant point is presented in the final sentence of the passage from Wheaton which clearly assumes that, when it exists, a right of navigation for commercial purposes is subject to certain conditions "regulating the mode of its exercise".

57. It is generally accepted that any right of navigation is in principle subject to the regulatory power of the riparian State. Thus, Professor O'Connell summarized the position in general international law in this way. He said:

> "In the absence of treaty obligation a riparian is not obliged to maintain the river for freedom of navigation, and hence may not be proceeded against, except under its own municipal law, for nonfeasance in the matter of river obstructions. Conversely, the regulatory jurisdiction which the riparian State possesses extends to the requirement that workers on board vessels passing through its waters or registered in its territory be insured. And, at least in principle, riparian freight rate limitations are not incompatible with the freedom of navigation." (*International Law*, 2nd ed., 1970, Vol. 1, p. 569.)

58. And the case law affirms the rule of general international law that a State may exercise a police power in respect of vessels exercising a Treaty-based right of free navigation in rivers within its territory. I refer now to the General Claims Commission's decision in *James H. McMahan (U.S.A.)* v. *United Mexican States* (1929).

59. This, I think, is important and I would like the patience of the President while I read the relevant passages. In the words of the decision:

> "In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognised right in navigating on a part of the Rio Grande *which serves as boundary between the two nations*:
>
> But, on the other hand, it is also necessary to take into account that the same Treaty of 1848, to which reference has been made above, in its Article VII further provides that:
>
> > 'The stipulations contained in the present Article shall not impair the territorial rights of either republic within its established limits.'
>
> The Treaty of 1853, as has been noted, leaves in force all of Article VII, in so far as it relates to all of that portion of the Rio Grande which under this Treaty was established as a boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.
>
> It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Rio Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the *sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them*.
>
> What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.
>
> Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, some police powers, at least, over the course of the Rio Grande, and it does not appear excessive or contrary to the right of free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts." (*Reports of International Arbitral Awards*, Vol. 4, p. 490).

60. The position in general international law will be explored further by my distinguished colleague, Mr. Reichler. In the present case, and especially in the absence of the median line boundary, it is Nicaragua and not Costa Rica which has a police power over the San Juan River. In the award of President Cleveland, as arbitrator, the question of the right of navigation of vessels of

war was resolved not by recourse to a generalized "right of free navigation" but to the conditions of navigation specified in the Treaty. Thus the right of navigation is given a configuration related to the object and purpose of the Treaty of Limits, and not related to some general principle of navigation.

Conclusion: the primary object and purpose of the 1858 Treaty was the definitive settlement of a long-standing dispute concerning title to territory

61. Mr. President, the evidence available leads to the inevitable conclusion that the primary object and purpose of the 1858 Treaty was the definitive settlement of the long-standing territorial dispute concerning the region of Nicoya. The evidence of the specific object and purpose is as follows:

(i) The historical context, including several bilateral treaties which form part of that historical context.

(ii) The nature of the title, and the text of the preamble.

(iii) The provisions of the Treaty itself, including the sequence of the provisions and the ranking of Article VI.

(iv) The diplomatic correspondence subsequent to the conclusion of the Treaty.

(v) The text of the Cleveland Award of 22 March 1888 and the report to the arbitrator by George L. Rives, Assistant Secretary of State, dated 2 March 1888.

62. Given that the Treaty of 1858 recognizes the territorial sovereignty of Nicaragua over the river as a whole, it must follow that the right of navigation is necessarily constrained by the existence of Nicaraguan title. Moreover, according to the general principles of international law, Nicaragua has both the right and the duty, as territorial sovereign, to make provision for safety of navigation and the maintenance of public order.

63. The ordinal significance of the interaction of territorial sovereignty and a régime of navigation is well recognized in the doctrine. The authorities refer to the regulatory power of the riparian State in such circumstances. When essentially similar legal questions were examined by international tribunals their decisions explicitly recognized that a State may exercise a police power in respect of vessels exercising a treaty-based right of free navigation in rivers forming part of its territory. In face of the awards in the *North Atlantic Coast Fisheries* case and in the *McMahan*

(U.S.A.) v. *United Mexican States* (1929) case, the Applicant State does not seek to deny either the authority or the relevance of these awards.

64. The counsel advancing the case for Costa Rica focus upon the words of Article VI of the Treaty of Limits, at least they do in principle. In reality the focus should be, in the first place, upon the territorial settlement, the grant of title over Nicoya to Costa Rica, and the determination of the boundary. In the context of general international law, the consequence is that the police power in respect of the San Juan River has been allocated to Nicaragua. Costa Rica does not have a police power because she does not have title in the area in question.

65. And thus the situation is in sharp contrast to the multilateral treaty régimes, such as the Oder or Danube, in which the multiple interests of the riparians necessitate some kind of segmentation of the police power. The police power involves the territorial sovereign having the power to decide the modalities of application of the provisions of the Treaty of Limits. And, in this context, the assertions of counsel for Costa Rica that the right of free navigation and sovereignty over the river of Nicaragua are on a basis of equality are without any legal foundation (CR 2009/2, para. 46 (Caflisch)).

66. In her Reply, Costa Rica is remarkably reluctant to recognize the force of the evidence, either in its separate manifestations, or as a whole. A careful examination of the individual sources is avoided. In this setting it has been necessary to reaffirm the pertinent elements of the interpretation of the Treaty of Limits and to place its provisions within the appropriate legal perspective.

67. Therefore, whatever the precise nature and extent of Costa Rica's rights within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua must have the exclusive competence to exercise the following regulatory powers:

(a) the protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation;

(b) the protection of the border, including resort to immigration procedures in respect to foreign nationals navigating in Nicaragua's territorial waters;

(c) the exercise of normal police powers;

(d) the protection of the environment and natural resources; and

(e) the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty; that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award.

The nature and extent of Costa Rica's rights will be examined in greater detail in the presentations which follow.

This concludes my presentation and I thank the Court for its courtesy and attention. Mr. President, you may wish to call a coffee break but, if not, my friend Professor Romero is ready to come to the podium.

The PRESIDENT: I thank Mr. Ian Brownlie for his presentation. I indeed agree that it is appropriate for the Court now to have a coffee break of approximately 10 minutes and will come back for the continuation.

The Court adjourned from 11.25 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. The Court resumes its sitting. I now invite Professor Antonio Remiro Brotóns to take the floor.

M. BROTÓNS : Merci, Monsieur le président.

LE DROIT DE LIBRE NAVIGATION DU COSTA RICA «CON OBJETOS DE COMERCIO» (AVEC DES «OBJETS DE COMMERCE») SUR UN TRONÇON DU FLEUVE SAN JUAN

Introduction

Monsieur le président, Messieurs les juges, je suis très honoré de me présenter ici à nouveau pour plaider la cause du Nicaragua.

1. Le Nicaragua croit avoir démontré lors de la phase écrite[15] que l'interprétation de l'article VI du traité Jerez-Cañas faite par le Costa Rica et à laquelle il s'obstine[16] est dépourvue de tout fondement au regard des règles d'interprétation rappelées dans les articles 31 et 32 de la

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[15] Contre-mémoire du Nicaragua (CMN), chap. 4, p. 143-196, par. 4.1.1-4.3.34 ; NR, chap. III, p. 99-157, par. 3.1-3.99.

[16] Réplique du Costa Rica (RCR, chap. 3. A-C, p. 43-70 (par. 3.01-3.78), G, p. 97 (par. 3.157 1) et 2) ; tableaux 1 et 2 (p. 99-151).

convention de Vienne sur le droit des traités. Faisant une interprétation tendancieuse de ladite disposition, le Costa Rica a essayé et tente encore d'obtenir par la voie judiciaire ce qu'il n'a pas pu obtenir par la négociation, à savoir, la revision du traité dans un sens plus favorable à ses intérêts.

2. En effet, le Costa Rica prétendait — et continue de prétendre — que le droit perpétuel de «libre navigation depuis l'embouchure du fleuve San Juan jusqu'à trois milles anglaises en aval du Castillo Viejo *avec des objets de commerce*»[17] établi par l'article VI du traité de 1858 lui octroie un droit d'utilisation de ce tronçon du fleuve pour toutes sortes d'activités touristiques, sportives et autres pouvant être réalisées sur un bateau en déplacement, et accuse le Nicaragua d'enfreindre ce droit dans la mesure où il limite et réglemente ces activités.

3. Le Costa Rica a articulé sa prétention sur une triple base :

1. l'affirmation d'un droit de libre navigation qui ne serait assorti d'aucune limite matérielle ;
2. la transformation de l'acception courante et naturelle de l'expression *objetos de comercio*, auxquels l'article VI du traité lie le droit de libre navigation, en un concept «finaliste», selon lequel *objets de commerce* ne représenterait pas des *choses*, des *marchandises*, mais des *fins*, des *objectifs* commerciaux ; et,
3. une interprétation *évolutive* de la notion de *commerce* comprenant des activités et des domaines qui lui étaient étrangers à l'époque où le traité fut conclu.

4. Pour renforcer l'idée que le droit de libre navigation existe en soi, de manière autonome et absolue, le Costa Rica non seulement l'a analysé indépendamment de tout lien avec les *objets de commerce*[18], mais en outre il a établi une différence explicite entre les présumées «*violations du droit perpétuel de libre navigation du Costa Rica*» et les «*violations du droit de navigation du Costa Rica «aux fins de commerce»*»[19], et de manière systématique, tout au long de ses

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[17] «[l]ibre navegación desde la desembocadura del rio San Juan hasta tres millas inglesas abajo del Castillo Viejo *con objetos de comercio*». Les italiques sont de nous, sauf indication contraire.

[18] RCR, chap. 3.B («A perpetual Right of Free Navigation»), chap. 3.C («Con objetos de comercio»).

[19] RCR, chap. 4.B (Breaches of Costa Rica's perpetual right of free navigation), chap. 4.C (Breaches of Costa Rica's right of navigation «for purposes of commerce»).

interventions écrites et orales, il fait de nombreuses allusions au *droit de libre navigation* tout court[20].

5. Les prémisses sur lesquelles s'appuie le Costa Rica étant erronées, les conséquences qui en découlent doivent être rejetées. Le droit de navigation du Costa Rica sur un tronçon du fleuve San Juan doit être interprété en tenant compte de la souveraineté du Nicaragua sur le fleuve, de sa «maîtrise exclusive et [son] contrôle suprême» pour reprendre les termes du traité[21]. Il doit aussi se limiter matériellement à être exercé «con objetos de comercio», c'est-à-dire, avec les choses qui font l'objet de l'activité commerciale.

Une navigation *con objetos de comercio* (avec des objets de commerce) : le texte

6. En appliquant la *règle générale* d'interprétation rappelée dans le paragraphe premier de l'article 31 de la convention de Vienne, c'est-à-dire, en interprétant les termes de l'article VI du traité Jerez-Cañas *bona fide* conformément à leur sens ordinaire dans le contexte du traité, il est clair que les *objets de commerce* sont des marchandises, des choses faisant l'objet d'un commerce.

7. On a beaucoup parlé de *objeto*, de *objetos*. Mais ce ne sont pas ces termes, isolés, *robinsoniens*, ceux qui gardent la clé de l'interprétation du droit de navigation octroyé au Costa Rica par l'article VI du traité Jerez-Cañas. C'est le syntagme, c'est-à-dire le groupe de mots «objetos de comercio», dont l'interprétation est déterminante à cette fin.

8. Le Nicaragua a demandé une expertise à M. Manuel Seco Reymundo, membre de l'Académie royale espagnole depuis 1979 et l'un des linguistes hispanophones les plus renommés, auteur du *Dictionnaire des doutes et des difficultés de la langue espagnole*[22] et du *Dictionnaire de l'espagnol actuel*[23]. Il est catégorique :

> «lorsque le terme admet *potentiellement* plusieurs contenus, comme ici, son sens *réel* (c'est-à-dire «effectif», «concret») ou son contenu précis ne peut être déterminé qu'à

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[20] Ainsi, à titre d'exemple, RCR, par. 1.27, 2.26, 2.27, 2.30, 2.33, 2.39, 2.40, 2.57, 2.68, 2.74 6), 3.79, 3.97, 3.134, 3.148, 4.38, 4.42, 4.50, 4.69, 4.70, 4.71, 4.87, 5.05, 5.25, 5.28 et 5.29 ; à titre d'exemple, voir CR 2009/2, p. 25, par. 2 ; p. 37, par. 10 ; p. 44, par. 34 ; p. 49, par. 46 ; p. 49, par. 49.1 ; p. 50, par. 49.2 ; p. 71, par. 62 ; et CR 2009/3, p. 8, par. 1 ; p. 12, par. 19 ; p. 22, par. 2 ; p. 23, par. 6 ; p. 26, par. 14 ; p. 31, par. 26 ; p. 39, par. 21 ; p. 44, par. 6 ; p. 53, par. 22 ; p. 51, par. 29, etc.

[21] «La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río San Juan…» (art. VI du traité Cañas-Jerez).

[22] *Diccionario de dudas y dificultades de la lengua española*, 1ª ed, Madrid, Aguilar, 1961; 10ª ed., Madrid, Espasa Calpe, 1998; 14ª reimpresión, 2008.

[23] *Diccionario del español actual*, 2 vol., Madrid, Aguilar, 1999.

> la lumière du *contexte dans lequel il apparaît, parmi les propos effectivement tenus par son auteur (oralement ou par écrit) concret.* Autrement dit, il s'agit là de l'aspect *syntaxique* du nom, au delà de son aspect purement *lexical*. Bien que le dictionnaire expose la *potentialité* sémantique d'un terme, seule la manière particulière dont ce dernier est utilisé révèle comment cette potentialité *se concrétise.*»[24]

9. Partant de ces considérations afin d'éclaircir la valeur du syntagme — ou groupe de mots — «objetos de comercio», M. Seco réalise une étude lexicale et de la syntaxe à partir des textes fournis par le Costa Rica lui-même[25] ainsi que d'autres extraits du *Corpus diachronique de l'espagnol actuel*[26], c'est-à-dire la banque de données de la langue espagnole jusqu'aux années 1980, préparée sous les auspices de l'Académie royale espagnole[27]. M. Seco constatait que dans tous les cas étudiés, le syntagme «objetos de comercio» ne correspond pas au sens de «fins ou objectifs» mais *de manière indubitable* à celui de «choses faisant l'objet d'activités commerciales»[28].

10. Le Costa Rica a présenté un avis affirmant tout le contraire[29]. Pour M. Moreno de Alba «la signification unique et indiscutable du syntagme *objets de commerce* est «à des fins de commerce» (de marchandises ou de personnes)»[30]. Comme les deux académiciens arrivent à des conclusions opposées, toutes deux présentées comme *incontestables*, il est évident que l'un d'eux se trompe.

11. Etant donné le caractère tardif de la demande faite par le Costa Rica en vertu de l'article 56.2 du Règlement pour produire l'avis du M. Moreno de Alba, tout porte à croire que

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[24] «When the *potential* content is numerous, as in this case, the *real* meaning (that is, «de facto», «actual») of a word in a phrase, its precise content, is only obtained thanks to *the context in which it appears in the actual speech of a specific issuer (speaker or writer).* In other words, it is the *syntactical* and not the purely *lexical* aspect of a noun. Although the dictionary gives us the semantic *potentiality* of a word, only its specific use can give us the concrete *realization* of that potentiality» (M. Seco Reymundo, *Dictate sober el Syntegra «con objetos de comercio» en el text del Traded de Limits entre Costa Rica y Nicaragua subscript el 15 de aril de 1858*, par. 6. (Duplique du Nicaragua (DN), vol. II, annexe 64, par. 6.) C'est lui qui souligne.

[25] RCR, tableau I : *Use of the term "Objetos" meaning "purposes" in nineteenth Century Documents*, RCR, p. 99-126.

[26] *Corpus Diacrónico del Español Actual* (CORDE).

[27] See en http //www.rae.es

[28] «[t]hinges on which the activity of commerce falls» (M. Saco Raymond, *Dictate*..., par. 13.

[29] Letter from the Agent of Costa Rica dated 27 November 2008, Annex 1.

[30] «[t]he Orly and unequivocal meaning of the syntagme «con objetos de comercio» ... is ... with purposes of commerce (of goods or people)» (J. G. Moreno de Alba, *Dictamen sobre el significado del sintagma «con objetos de comercio» en el contexto del articulo 6° del «Tratado de Limites entre Costa Rica y Nicaragua» (14 de abril de 1858)*, 9 de noviembre de 2008, Documents Annexed to Letter from Agent of Costa Rica dated 27 November 2008, Ann. I).

l'avis de M. Seco a beaucoup inquiété le demandeur, qui a invoqué le principe d'*égalité des armes* pour fonder sa demande[31].

12. Un conseil du Costa Rica a soutenu que M. Seco «répète ce que le défendeur a avancé dans son contre-mémoire»[32]. Je préférerais croire qu'il n'y a pas de messages cachés dans cette affirmation. M. Seco est très soucieux de sa réputation professionnelle. En tous cas, le Costa Rica fait erreur dans son appréciation et même il se contredit. Car, si M. Seco répète le contre-mémoire du Nicaragua, comment pourrait-on expliquer que — comme l'affirme le Costa Rica — «le Nicaragua a changé de tactique au cours de la phase écrite. Dans son contre-mémoire son effort s'est concentré sur sa volonté de démontrer que «objetos» voulait dire «articles». Dans sa duplique, le Nicaragua aurait découvert que le terme essentiel serait «comercio».» Mais l'explication est très simple : l'avis de M. Seco nous a convaincus de l'impossibilité d'arriver à des conclusions définitives sur la portée du droit de navigation «con objetos de comercio» si on insistait sur l'exégèse du terme «objetos», isolé des autres mots qui composent le groupe à interpréter.

13. Monsieur le président, pour neutraliser l'avis d'une autorité reconnue dans la lexicographie et la recherche syntaxique, il ne suffit pas de présenter en dernière minute un autre avis ; cela peut même s'avérer contreproductif. Indépendamment du fait qu'un expert puisse être plus qualifié qu'un autre sur le point soumis à son expertise, il convient de comparer le raisonnement suivi par l'un et l'autre pour apprécier la valeur respective de leur avis.

14. Malheureusement, peut-être en raison du bref délai qui lui était imparti pour remplir sa tâche, l'avis de M. Moreno de Alba n'apporte pas de preuves documentaires à l'appui de ses conclusions sur l'interprétation du syntagme «objetos de comercio», ce qui est assez préoccupant.

[Projection 1]

15. Peut-être aurait-il pu en chercher dans le *Corpus diacronique de l'espagnol actuel*. M. Moreno de Alba connaît cet ouvrage, qu'il invoque sur d'autres points[33]. En revanche, l'expert du Costa Rica passe sous silence l'existence des huit cas du syntagme «objetos de comercio» que le

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[31] Letter from the Agent of Costa Rica dated 27 November 2008, p. 2.

[32] CR 2009/2, p. 55, par. 12.

[33] J. G. Moreno de Alba, *Dictamen*, cit., par. II, III.2, IV.1, VI.

Corpus diacronique recense depuis 1820, tous avec une signification dépourvue de tout équivoque : il s'agit de «choses faisant l'objet d'activités commerciales»[34]. Ces cas, auxquels on peut accéder sans difficulté et sans coût grâce à la page *web* de l'Académie royale espagnole[35], figurent dans le dossier dont vous disposez, Messieurs les juges.

La traduction anglaise de la phrase «con objetos de comercio» (avec des objets de commerce)

16. Monsieur le président, le Costa Rica prétend remplacer l'interprétation du seul texte authentique rédigé en espagnol par l'interprétation d'une traduction anglaise faite à l'occasion de l'arbitrage Cleveland qu'il considère mieux adaptée à ses prétentions. Cependant, la traduction du syntagme «con objetos de comercio» par «for purposes of commerce» n'impliquait nullement une prise de position sur différentes interprétations de la portée du droit de libre navigation ni de la part des Parties, ni de celle de l'arbitre : ce n'était pas un point controversé soumis à la décision du président Cleveland.

17. Le Costa Rica essaie de noyer la Cour sous une longue liste de documents du XIXe siècle utilisant le terme «objetos» (objets) au pluriel dans le sens de «purposes»[36]. Cependant, la plupart — soixante sur soixante-seize — des exemples cités ne parlent pas d'objets au pluriel mais d'objet au singulier et par conséquent ne sont pas pertinents dans le cas qui nous occupe : le Nicaragua ne conteste pas les différentes acceptions du terme «objet» au singulier. Il peut se référer indifféremment à une matière, à une chose et, également, à un objectif ou à une fin, selon le contexte de la phrase.

18. En outre, dans dix des seize dispositions figurant dans la liste mentionnée concernant le mot «objetos» (objets) au pluriel et que le Costa Rica traduit par «purposes», le terme «objetos» apparaît seul[37], ce qui prive également ces exemples de pertinence pour la même raison. Ce qui est contesté par le Nicaragua dans cette affaire est le sens que le Costa Rica donne à *objets* au pluriel quand ces *objets* sont liés au *commerce* et qu'on prétend naviguer avec eux.

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[34] «[t]hings on which the activity of commerce falls» (M. Seco Reymundo, *Dictamen*, par. 13).

[35] Real Academia Española: Banco de Datos (CORDE) (en línea). *Corpus diacrónico del español* (http://www.rae.es)

[36] Tableau 1: utilisation du terme «objetos» au sens de «fins» dans les documents du XIXe siècle (Table 1: Use of the term «objetos» meaning «purposes» in 19th Century Documents) (RCR, p. 99-126).

[37] Doc. 3 (art. 37, p. 101), 7 (art. 3 et 7, p. 106), 10 (art. VIII, p. 109), 11 (préambule, p. 110), 14 (art. I et VII, p. 112), 15 (art. VII et XIX, p. 113) et 28 (par. V, p. 123).

19. Au surplus, la traduction de «objetos» par «purposes» ne saurait établir la signification du terme dans la langue d'origine, celle du traité ; c'est le sens de l'expression dans son ensemble, en langue espagnole — *objetos de comercio* — qui est important dans ce cas. Je le rappelle : il s'agit ici de l'interprétation d'un texte faisant autorité uniquement et exclusivement en langue espagnole et non de ses traductions.

20. Il ne nous reste que six exemples dans la liste, mais comme deux d'entre eux correspondent à l'article VI du traité Jerez-Cañas[38] et à la sentence Cleveland[39] qui les mentionne et dont l'interprétation est précisément au cœur de la controverse, ils sont dépourvus de toute valeur probante. Ne restent donc que quatre dispositions[40], identiques, qui se réfèrent au droit des citoyens des parties à «louer et occuper des maisons et des entrepôts par *los objetos de su comercio (for the purpose(s) of their commerce)*»[41].

21. Il s'agit là d'une disposition type spécifique des traités d'amitié, de commerce et de navigation depuis le traité Jay entre la Grande-Bretagne et les Etats-Unis, du 19 novembre 1794[42], disposition qui, dans les relations entre les Etats-Unis et le Nicaragua, figure à l'article II du traité Molina-Webster du 10 juillet 1851, et que l'on retrouve dans les traités Cass-Irissarri du 16 novembre 1857, et Lamar-Zeledón du 16 mars 1859, non ratifiés, et plus tard dans celui dit Ayón-Dickinson du 21 juin 1867.

22. Mais, quel sens faut-il donner au fait que les citoyens des deux pays aient la liberté de louer et d'occuper des maisons et des entrepôts «para los objetos de su comercio» («for the purposes of their commerce»).

[Projection 2]

23. A la lumière du contexte dans lequel cette disposition est employée — contexte commun à tous les traités de ce type — l'interprétation s'impose d'elle-même. Si nous lisons, par exemple, l'article 14 du traité Jay, nous pouvons constater, qu'après avoir établi la liberté de commerce et de navigation entre les deux pays, cet article fait très précisément référence au droit de leur citoyens

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[38] Doc. 10 (art. 6, p. 108).

[39] Doc. 28 (p.123, par. 2).

[40] Doc 6 (art. II, p. 105), 9 (art. II, p. 107), 12 (art. II, p. 111) et 16 (art. II, p. 114).

[41] RCR, p. 4-5 et 60-62, par. 1.10-1.11 et 3.55-3.59.

[42] Voir C. Parry, *The Consolidated Treaty Series*, vol. 52 (1793-1795), 1969, Oceana Publ. Inc., p. 243-272.

«to come with their Ships and Cargoes to the Lands, Countries, Cities, Ports Places and Rivers within (their) Dominions and Territories» et, ensuite, «to hire and occupy houses and warehouses for the purposes of their commerce».

[Projection 3]

24. Le traité d'amitié, commerce et navigation entre les Etats-Unis et le Costa Rica, conclu le 10 juillet 1851, suit, comme tant d'autres traités de cette période, le même modèle : son article II proclame, lui aussi, la liberté de commerce, le droit des citoyens des parties «to come with their ships and cargoes to all places ports and rivers of [their] territories»[43] et, finalement, la faculté «to hire and occupy houses and warehouses for the purposes of their commerce»[44].

25. Le commerce, le *business*, de ces citoyens qui louent et occupent des maisons et des entrepôts se traduisait en marchandises, fruits, articles, etc. Leur commerce porte évidemment sur les marchandises qu'ils achètent et qu'ils vendent et logiquement qu'ils entreposent et emmagasinent dans des bâtiments et des entrepôts. Ou bien devrait-on penser que la cargaison des navires qui entrent et sortent des ports et des fleuves sont des abstractions et que dans les hangars on emmagasine projets et intentions ? Peut-être dans la littérature de science-fiction, mais sûrement pas dans les traités dont nous parlons.

26. Voilà donc ce qui reste, *rien !*, du «nombre impressionnant», selon le Costa Rica, «de traités, contrats et autres instruments pertinents contemporains du traité de limites dans lesquels le terme «objetos» a été utilisé très majoritairement au sens de «fins»»[45]. Le Costa Rica aboutit ainsi au contraire du but recherché, vu qu'il ne peut produire aucun document permettant d'arriver à une autre conclusion mais qu'il en présente beaucoup qui confortent l'analyse du Nicaragua. Au XIX^e siècle les *objetos de comercio* ce sont seulement des marchandises.

27. Le Costa Rica inclut une seconde liste de références à des termes employés dans des documents du XIX^e siècle concernant le trafic commercial[46]. Cette liste est encore plus inutile que

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[43] «para ir … con sus buques y cargamentos, a todos parajes, puertos y ríos en los territorios antedichos».

[44] «para alquilar y ocupar casas y almacenes para los objetos *[sic]* de su comercio».

[45] «[i]mpressive number of relevant treaties, contracts and other instruments contemporary with the Treaty of Limits in which the term «objetos» was overwhelmingly used as meaning «purposes»» (RCR, par. 3.60).

[46] Tableau 2 : termes utilisés pour désigner les articles de commerce, les biens, les objets, etc. dans les documents du XIX^e siècle (Table 2: Terms to refer to Articles of trade, goods, things, etc. in 19th century documents), RCR, p. 127-151.

la première : elle se limite à prouver la richesse de la langue quand elle se réfère à — et je cite en espagnol — *mercancías, mercaderías, artículos, cosas, productos, bienes, frutos, efectos, materiales, géneros, producciones, manufacturas*, et, bien sûr, *objetos*, c'est-à-dire, *marchandises, articles, choses, produits, biens, fruits, effets, matériaux, productions, manufactures, objets*, qui se traduisent par *merchandises, articles, things, products, goods, effects, stock, items, materials, manufacture, objects…* Et pouvait-il en être autrement ? La langue de Don Quichotte, auquel la Partie adverse nous a fait l'honneur de nous comparer[47], est si riche que la liste pourrait être encore allongée.

La notion de «comercio» (commerce) vers le milieu du XIX^e^ siècle

28. Monsieur le président, Messieurs les juges, même si l'on invente une intention particulière derrière la référence de l'article VI du traité Jerez-Cañas aux «objets de commerce» compris comme «fins commerciales», le contexte du traité, à l'époque où le traité a été adopté, renvoie nécessairement ces objectifs au trafic de marchandises. La preuve grammaticale est frappante. La pratique conventionnelle l'est aussi.

29. En quoi consistait le *commerce* au milieu du XIX^e^ siècle ? La première acception de *comercio* (commerce) que propose le *Dictionnaire de l'Académie royale espagnole* de 1803 est : «Négociation et trafic qui se fait en achetant, en vendant, en échangeant des choses»[48].

[Projection 4 et 5]

30. On retrouve la même acception dans toutes les éditions postérieures[49] et, bien sûr, dans celle de 1852, en vigueur lors de la signature du traité Jerez-Cañas. Aujourd'hui *commerce* est encore en premier lieu «Négociation qui se fait en achetant et en vendant ou en échangeant des produits ou des marchandises»[50]. Cette acception, à laquelle se limite le Nicaragua, correspond littéralement à la racine latine du mot.

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[47] CR 2009/2, p. 75, par. 71.

[48] «Negociación y tráfico que se hace comprando, vendiendo o permutando unas cosas con otras» (DN, vol. II, annexe 59, p. 365) ; traduction anglaise : «Negotiation and traffic that is done buying, selling or exchanging some things for others» (Letter from Agent of Costa Rica, préc., annexe III).

[49] Voir DN, vol. II, annexe 59, p. 365-368

[50] «Negociación que se hace comprando y vendiendo o permutando géneros o mercancías» (*Diccionario de la Lengua Española*, Real Academia Española, 22^e^ ed., 2001, p. 598).

31. Le Costa Rica a eu recours à l'article 56.2 du Règlement pour tenter d'accréditer, avec l'autorisation généreuse de la Cour, la possibilité de deux autres acceptions du terme dans les éditions successives du *Dictionnaire*[51].

32. Est-ce que les nouvelles acceptions avancées par le Costa Rica *in extremis* changent-elles les données du problème ? Sûrement pas celle qui définit «commerce» comme «corps ou compagnie de commerçants en produits, marchandises, etc.»[52], c'est-à-dire, comme la *societas mercatorum*.

33. La réponse est également *non* pour ce qui est de l'autre acception, qui définit «comercio» comme «Comunicación y trato de unas gentes o pueblos con otros», c'est-à-dire, «Communication et relations de groupes de personnes et de peuples avec d'autres»[53].

34. Il est surprenant que l'expert du Costa Rica passe sous silence — un autre de ses silences — la première acception commune et courante du commerce, liée à la «mercatura», ne serait-ce que pour la désavouer. Il préfère, comme le Costa Rica, s'en tenir à l'acception du commerce comme la communication entre peuples.

35. Cependant la notion de commerce comme «comunicatio», tombée d'ailleurs en désuétude aujourd'hui, comme le précise le *Dictionnaire*[54], est trop générique pour pouvoir avoir une signification dans le texte et le contexte de l'article VI du traité Jerez-Cañas. Et mieux vaut ne pas trop s'y attarder, parce que lorsque l'Académie précise les manifestations de cette communication, elle fait référence au type de commerce[55] pratiqué par la *troupe* du commandant Pantaleon Pantoja qui naviguait sur les fleuves de l'Amazonie, sur un bateau public, comme nous le raconte Mario Vargas Llosa[56]. Si commerce est toute communication, les «objetos de comercio»

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[51] Letter from the Agent of Costa Rica, *op. cit.*, Ann. III.

[52] «Cuerpo o compañia de comerciantes en géneros, mercancias, etc…».

[53] Traduction anglaise: «Communication and dealing of groups of individuals and peoples with others». Traduction faite par le Costa Rica: «Communication et relations de personnes ou de peuples avec d'autres»; traduction anglaise : «Communication and dealing of peoples and towns with others» (Letter from the agent of Costa Rica, *op. cit.*, Ann. III).

[54] *Diccionario de la Lengua Española*, Real Academia Española, 22^{e} éd., 2001, p. 599. Voir huitième acception.

[55] *Diccionario de la Lengua Española*, Real Academia Española, 10^{e} éd., 1852, «La comunicación y trato secreto, por lo común ilícito, entre dos personas de distinto sexo» (Letter from the Agent of Costa Rica, *op. cit.*, Ann. III, *g)*.

[56] M. Vargas Llosa, *Pantaleón y las Visitadoras*, Seix Barral, Barcelona, 1973 ; éd. en langue anglaise (*Captain Pantoja and the Special Service*, Harper & Row, New York, 1979 ; éd. française, (*Pantaleon et les Visiteuses*), Gallimard, Paris, 1990.

deviennent «objetos de comunicación» et les «purposes of commerce» se transforment en «purposes of communication». Etant donné que la communication dont on parle est fluviale, le droit reconnu par l'article VI du traité serait *le droit de navigation aux fins de la navigation* sur un tronçon du fleuve San Juan.

36. Cette approche biaisée du Costa Rica va de pair avec l'apparition dans le discours de son expert du verbe «traficar» («trafiquer») comme référence culte. Selon M. Moreno de Alba, «si *trafiquer* est, selon le *Dictionnaire*, synonyme de *faire du commerce*, et *trafic* équivaut à *commerce*, *commerce* peut très bien signifier «mouvement ou transit de personnes» et pas seulement de choses. Le commerce, le trafic peut se faire avec des choses et, aussi, avec des personnes», écrit-il[57].

37. Cependant il manque une étape dans ce raisonnement. L'expert du Costa Rica saute un élément, car on peut imaginer des dizaines de cas de personnes se déplaçant dans lesquels il y a trafic, mais il n'y a pas de commerce.

38. En outre, «comerciar» (faire du commerce) signifie, comme on peut le lire dans le même *Dictionnaire*, «négocier, en achetant, en vendant, en échangeant des produits»[58]. D'où il découle que si «trafiquer», le verbe qu'affectionne M. Moreno de Alba, est «faire du commerce», *trafiquer* cela sera : «négocier, en achetant, en vendant, en échangeant des produits».

39. Cette conclusion, qui se dégage inévitablement de l'avis de l'expert du Costa Rica, est certes admise expressément dans le *Dictionnaire*. Quand M. Moreno de Alba nous dit que la première acception de «trafiquer» est «faire du commerce», il dit vérité, mais non toute la vérité.

[Projection 6]

40. La première acception de «trafiquer» est «faire du commerce», virgule, «négocier avec l'argent et les marchandises»[59]. Tout lecteur de dictionnaires, et particulièrement ceux d'un dictionnaire académique, comprend cette addition, omise par l'expert du Costa Rica, comme «faire du commerce, *dans le sens* de négocier avec l'argent et les marchandises».

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[57] «If *to traffic* , according to the DRAE, is a synonym of *to commerce, and* traffic *is a synonym of* commerce, thus *commerce* can manifestly signify movement or transit of people, not only of things. Commerce and, therefore, traffic, can be attributed to things as well as to people» (J.G. Moreno de Alba, *Dictamen, op. cit.*, par. VII). C'est lui qui souligne.

[58] «negociar comprando y vendiendo o permutando géneros». (*Diccionario, op. cit.*, p. 598).

[59] «negociar con el dinero y las mercancías» *(Diccionario, op. cit.*, p. 2206).

41. Il n'est donc pas étonnant qu'une lecture erronée du *Dictionnaire* soit à l'origine d'autres erreurs comme celle, très embarrassante, d'inclure le trafic, la traite de personnes, dans ces conclusions, ce qui, incontestablement, n'entrait pas dans l'intention des parties au traité Jerez-Cañas. Monsieur le président, Messieurs les juges, si vous me permettez cet oxymoron, les *silences* de l'avis de l'expert du Costa Rica *parlent*.

42. Au vu de ces données, la seule conclusion à laquelle on peut aboutir d'un point de vue lexicographique et syntaxique est la suivante : dans l'article VI du traité Jerez-Cañas, signé le 15 avril 1858, le syntagme *con objetos de comercio* signifie «avec des choses faisant l'objet d'activités commerciales»[60], c'est-à-dire, en bon français, «avec des marchandises».

La confirmation de l'interprétation du texte

43. Les conclusions qui découlent du texte de l'article VI sont confirmées par son contexte (visé à l'article 31, paragraphe 2, de la convention de Vienne), c'est-à-dire, dans le cas présent, le traité Jerez-Cañas dans son ensemble, y compris son objet et son but. Le titre même du traité l'identifie comme un traité de «limites» (c'est-à-dire un traité frontalier) entre le Nicaragua et le Costa Rica qui, comme ils le déclarent dans le préambule, tentent de mettre fin à leurs différends. La nature d'un traité est de grande importance, bien évidemment, sur les effets de l'interprétation de ses clauses. Je me réfère à cet égard à la présentation très convaincante déjà faite par mon collègue, M. Brownlie.

44. Le Costa Rica soutient que les termes «con objetos de comercio» dans le contexte du traité peuvent seulement signifier «aux fins de commerce», et pour essayer de le démontrer, le Costa Rica mentionne quatre éléments du contexte qu'il considère «fondamentaux».[61] Le problème avec le Costa Rica est qu'il considère acquises des interprétations du traité de 1858 non partagées par le Nicaragua.

45. En particulier, le Costa Rica présente une tendance inquiétante à remplacer le texte par le contexte. C'est ainsi, par exemple, qu'en se référant à la zone géographique où les navires de l'un ou l'autre Etat peuvent accoster, décrite comme «la portion du fleuve où la navigation est

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[60] «[t]hings on which the activity of commerce falls» (M. Seco Reymundo, *Dictamen*, par. 13).

[61] CR 2009/2, p. 64-66, par. 40-45.

commune», le Costa Rica demande au Nicaragua «comment...[p]eut-il expliquer l'adjectif «commune» qui qualifie la navigation des deux Etats sur ce tronçon, s'il est vrai que l'un d'entre eux aurait un droit absolu de navigation et l'autre un droit extrêmement limité ?»[62].

46. La question est très facile à résoudre. Parler d'un tronçon du fleuve où la navigation est commune n'implique pas que le droit sous-jacent soit identique pour tous les navires. Pour le Nicaragua le droit de naviguer a son fondement dans la souveraineté territoriale ; pour le Costa Rica le fondement se trouve dans la disposition lui attribuant le droit de naviguer «con objetos de comercio», les deux titres, le nicaraguayen et le costa-ricien, étant reconnus dans l'article VI du traité. Le contexte ne peut pas déborder le texte.

47. Au demeurant, étant donné que l'application de la *règle générale* de l'article 31 de la convention de Vienne donne une interprétation claire et raisonnable de la portée du droit reconnu au Costa Rica dans l'article VI du traité Jerez-Cañas[63], il n'est pas nécessaire d'avoir recours aux moyens d'interprétation complémentaires cités dans l'article 32 de la convention. J'insiste sur ce point[64] parce que le Costa Rica s'entête à affirmer que le Nicaragua prétend remplacer l'interprétation résultant de la *règle générale* par une interprétation fondée surtout sur les moyens complémentaires[65].

48. Quoi qu'il en soit, les antécédents confirment l'interprétation faite par le Nicaragua conformément à la *règle générale* rappelée par l'article 31 de la convention de Vienne. Tous les documents diplomatiques et les traités avortés antérieurs au traité Jerez-Cañas rapportent la navigation sur le fleuve San Juan au transport de fruits, de produits, de marchandises, notamment du café. Vers 1850, le café représentait plus de 90 % des exportations du Costa Rica, la moitié de la production était destinée à la Grande-Bretagne. Le Costa Rica n'ayant pas de port propre dans les Caraïbes, il était vital pour lui d'obtenir un débouché sur cette mer afin d'éviter la route du cap Horn, dangereuse, longue et coûteuse, et de réduire une traversée de cinq mois à tout au plus quarante jours.

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[62] CR 2009/2, p. 65, par. 42.

[63] CMN, p. 156 et suiv., par. 4.1.23 et suiv.

[64] CMN, p. 160, par. 4.1.34.

[65] CR 2009/2, p. 73, par. 63.

49. Il en va de même de la pratique postérieure dont le professeur Pellet dira quelques mots dans un instant. Peu de mots d'ailleurs, car, justement il n'y a pas eu de pratique ni de contestations ; et c'est, en soi, très significatif.

Conclusion

50. En résumé, Monsieur le président, Messieurs les juges, les *objets de commerce* auxquels se réfère l'article VI du traité Jerez-Cañas sont, dans tous les cas, des choses, des produits ou des marchandises, aussi bien si l'on considère l'interprétation grammaticale du syntagme que si l'on constate, dans une perspective historique, qu'il ne pouvait s'agir que de ceci dans le contexte du milieu du XIX^e siècle.

51. Le Costa Rica insiste sur la séparation du droit de navigation et de la limitation expresse de le faire «avec des objets de commerce»[66], bien qu'ils soient inséparables, comme la tête et le tronc pour rester en vie. Dans l'interprétation du Costa Rica la «navigation» en vient à occuper tout l'espace et devenir un droit en soi, quel que soit son objet, qu'il s'agisse de tourisme, de radiodiffusion, de pêche sportive et commerciale ou de jeux de hasard : toutes ces activités allant clairement au-delà du simple transfert ou du transport de marchandises auquel le droit de navigation établi par le traité fait exclusivement référence. L'objectif du Costa Rica n'est pas de naviguer *for purposes of commerce* mais d'exploiter à d'autres fins un fleuve qui ne lui appartient pas.

52. Est-ce que le Costa Rica pourrait fonder ses prétentions sur une interprétation *évolutive* de la notion et du contenu du *commerce* qui a changé au fil du temps ? Certes, il y a des traités qui, par leur nature, leur objet et leurs fins, se prêtent à ladite interprétation. Mais ce n'est pas le cas du traité Jerez-Cañas. Le professeur Pellet présentera la position du Nicaragua sur cette question.

53. Le Nicaragua peut être disposé à négocier avec le Costa Rica l'exploitation du fleuve dans le cadre d'une coopération transfrontalière profitable pour les deux Parties, mais il ne peut accepter comme un droit conventionnel du pays frère une prétention politique basée sur ses propres intérêts économiques. Une chose est l'interprétation même évolutive d'un traité et une autre la revision de ce traité par voie judiciaire.

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[66] RCR, chap. 3.B, p. 44-55, par. 3.05-3.38.

Monsieur le président, Messieurs les juges, je vous remercie de votre très aimable attention et, ayant achevé mon exposé, je vous prie, Monsieur le président, de bien vouloir appeler à cette barre le professeur Pellet pour la suite de la présentation du Nicaragua.

The PRESIDENT: I thank Professor Brotóns for his presentation. I now invite Professor Alain Pellet to take the floor.

M. PELLET :

INTERPRÉTATION DU TRAITÉ (SUITE)

1. Monsieur le président, Messieurs les juges, c'est un honneur et un plaisir de plaider devant les seize personnalités éminentes qui siègent aujourd'hui dans le grand hall de Justice, au nom à nouveau du Nicaragua. Je ne puis cependant m'empêcher de relever— et de regretter — l'absence de toute femme sur le siège — et pas seulement parce que ceci me prive de la possibilité de plaider en faveur de la féminisation des appellations…

2. Messieurs de la Cour donc, il m'incombe de compléter ce qu'a dit à l'instant mon collègue et ami Antonio Remiro Brotóns au sujet de l'interprétation du traité de 1858 et, plus spécialement, de cette fameuse expression : «*objetos de comercio*», ceci à la lumière de la pratique ultérieure. Je m'emploierai donc à montrer, dans un premier temps, que les libertés que l'on peut prendre avec le sens des mots dans l'interprétation des traités sont limitées— et beaucoup plus limitées que le Costa Rica voudrait le faire croire ; et, dans un second temps, que ses fantaisies interprétatives ne sont aucunement confirmées par la pratique ultérieurement suivie par les Parties.

I. Les limites de l'interprétation évolutive

3. Monsieur le président, la question de l'effet du passage du temps sur l'interprétation des traités a fait l'objet d'un nombre impressionnant de savants travaux, dissertant à l'infini sur les vertus comparées de l'interprétation «contemporaine» (ou du «renvoi fixe» *(fixed reference)* par rapport à l'interprétation évolutive (c'est le «renvoi mobile» *(mobile reference)*. Il s'agit, j'en conviens, d'un problème intellectuellement passionnant, mais je ne suis pas sûr qu'il justifie la véritable guerre de religions à laquelle se livrent les tenants de l'une ou de l'autre de ces approches, dont la combinaison s'impose si l'on veut aboutir à un résultat raisonnable. Et le principe de base

qui constitue la toile de fond de cette opération n'a rien de mystérieux et me paraît vraiment indiscutable ; il est celui-là même qui inspire le droit des traités dans son ensemble : tout se rapporte à *l'intention des Parties*.

4. Dans son avis de 1971 sur la *Namibie*, la Cour avait insisté sur «la nécessité primordiale d'interpréter un instrument donné conformément aux intentions qu'ont eues les parties lors de sa conclusion» *(the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion)* (*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, avis consultatif, *C.I.J. Recueil 1971*, p. 31, par. 53) ; — et je relève que cette formule figure dans l'avis même qui est en général cité par les partisans de l'interprétation évolutive à l'appui de leur thèse, puisque c'est aussi dans l'avis de *Namibie* que la Cour a déclaré qu'un traité devrait être interprété «dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu» *(within the framework of the entire legal system prevailing at the time of the interpretation)*. Pour cela, la «Cour doit rechercher quelle était l'intention des parties à l'époque» *(the Court must seek to ascertain the intention of the parties at the time)* (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), fond*, arrêt, *C.I.J. Recueil 2002*, p. 346, par. 59). D'ailleurs, c'est également ainsi qu'a procédé l'ingénieur général Alexander dans sa première sentence datée du 30 septembre 1897 : «the principal and the controlling [consideration] is that we are to interpret and give effect to the Treaty ... in a way in which it was mutually understood *at the time by its makers*» («La principale [considération] est que nous devons interpréter et appliquer le traité ... comme il a été mutuellement compris *à l'époque par ses auteurs*»)[67]. La question est donc de savoir si, au moment de la signature du traité de 1858, le Costa Rica et le Nicaragua avaient entendu figer la situation prévalant alors ou s'ils l'avaient conçu comme devant s'adapter aux évolutions à venir.

5. Etant donné sa nature de traité frontalier, il ne peut faire de doute que les Parties l'ont conçu essentiellement («essentiellement» au sens de «par essence») comme devant avoir un effet stabilisateur. Il s'agit — c'est son nom — d'un traité «de limites» et, comme l'a rappelé

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[67] MCR, vol. 2, annexe 18 ; les italiques sont de nous.

M. Brownlie tout à l'heure, «lorsque deux pays définissent entre eux une frontière, un de leurs principaux objectifs est d'arrêter une solution stable et définitive» («when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality») (*Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 34 ; voir aussi *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 37, par. 72). Il n'est pas davantage douteux que l'article VI du traité de 1858 relatif au régime du fleuve San Juan fait partie intégrante de ce règlement frontalier global, et ceci conduit à un à priori en faveur d'une interprétation restrictive des limitations qu'apporte cette disposition aux compétences souveraines («*dominium* et *imperium* exclusifs» («exclusive *dominium* and supreme control») qu'elle reconnaît expressément au Nicaragua. Et il s'agit bien d'une limitation — comme le Costa Rica le concède du bout des lèvres[68]. Alors que la première phrase de l'article VI reconnaît la souveraineté du Nicaragua sur les eaux du fleuve, la deuxième, qui établit le droit de navigation (limité) du Costa Rica, le présente clairement comme une exception : ce que traduit la conjonction «toutefois» («pero»).

6. C'est en ayant à l'esprit ce souci fondamental de stabilité qu'il faut interpréter, plus précisément, «le droit perpétuel de libre navigation ... avec des marchandises» (los derechos perpetuos de libre navigacion ... con objetos de comercio) dont jouit le Costa Rica. Le «droit perpétuel» ne me paraît pas prêter à controverse — sinon que, contrairement à ce que nos contradicteurs répètent à l'envi, «perpétuel», cela ne veut pas dire «absolu» ou «inconditionnel»[69]. En revanche, il est clair que la navigation et les marchandises — les «objets de commerce» — ont considérablement évolué en cent cinquante ans et qu'il serait absurde de considérer que le droit de navigation reconnu au Costa Rica par l'article VI du traité ne peut être exercé aujourd'hui qu'avec des goélettes ou des bateaux à vapeur. De même, il serait déraisonnable de confiner les «objets de commerce» bénéficiant de cette liberté aux seules marchandises qui existaient en 1858 : la liberté du Costa Rica de naviguer sur le San Juan «con objetos de comercio», renvoie, pour reprendre l'expression de la Cour dans l'affaire de la *Namibie*, à des notions qui «n'étaient pas statiques mais

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[68] Cf. RCR, p. 30, par. 2.41, p. 58, par. 3.50 ; mais voir p. 39-40, par. 2.71. Voir aussi CR 2009/2, p. 34, par. 12, p. 38, par. 26, p. 41, par. 36, p. 44, par. 45 (Caflisch) ; CR 2009/3, p. 23, par. 7 (Caflisch) ; *contra* CR 2009/3, p. 23, par. 6, p. 33, par. 33 (Caflisch).

[69] Voir note CR 2009/3, p. 18, par. 35 (Crawford), p. 23, par.7, p. 30, par. 23, p. 31, par. 26 iv) (Caflisch).

par définition évolutives» («were not static, but were by definition evolutionary») (*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 31, par. 53)[70].

7. Dans le très bref développement qu'il a consacré à cette question, le professeur Kohen, se référant à l'arrêt de la Cour dans l'affaire du *Plateau continental de la mer Egée*[71], prétend que «si l'affirmation nicaraguayenne relative aux marchandises est vraie, alors elle doit également s'appliquer aux «fins du commerce»»[72]. Cette forte — mais lapidaire — affirmation repose sur deux postulats :

1) «con objetos de comercio» signifierait «avec des fins du commerce» ce qui, en français, écorche vraiment les oreilles — ce postulat est faux ; et
2) le «commerce» tel que l'envisage l'article VI du traité Cañas-Jérez est une notion évolutive ; ce second postulat va un peu vite en besogne car c'est justement ce qu'il faut démontrer !

8. En effet, pour «rechercher quelle était l'intention des parties à l'époque» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 346, par. 59), la Cour doit interpréter l'expression «los derechos perpetuos de libre navegacion ... con objetos de comercio» dans son ensemble «by reference to the circumstances prevailing when the treaty was concluded» («eu égard aux circonstances prévalant au moment de la conclusion du traité»)[73]. Je note d'ailleurs en passant que c'est également ainsi qu'a procédé l'ingénieur général Alexander dans la sentence arbitrale qu'il a rendue le 30 septembre 1897 : «It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words of sentences.» («C'est ce qu'avaient à l'esprit les hommes qui ont élaboré le traité que nous devons rechercher, et

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[70] Voir aussi, sentence arbitrale, 17 juillet 1986, *Filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France*, *RSA*, vol. XIX, p. 247, n° 37; sentence arbitrale, 24 mai 2005, *Chemin de fer dit Iron Rhine («IJzeren Rijn») entre le Royaume de Belgique et le Royaume des Pays-Bas*, *RSA*, vol. XXVII, p. 72-74.

[71] *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77

[72] CR 2009/2, p. 67, par. 73 (Kohen).

[73] Sentence arbitrale, 13 avril 2002 concernant la *Délimitation de la frontière entre l'Erythrée et l'Ethiopie*, *RSA*, vol. XXV, p. 110, par. 3.5.

non un sens hypothétique que l'on puisse imposer à des mots isolés.»)[74] Or, au milieu du XIXe siècle, il s'agissait exclusivement de permettre au Costa Rica d'exporter ses productions, en particulier son café, par la voie atlantique comme le professeur Remiro Brotóns vient de le rappeler[75]. Nul ne pouvait envisager que les touristes, à l'époque seulement de riches et curieux oisifs, pourraient être définis comme des marchandises (en admettant que ce soit le cas aujourd'hui — *quod non*) : imagine-t-on Chateaubriand, Phileas Fogg ou, honni soit qui mal y pense !, Lord Elgin, en «objets de commerce» ? (ce qui ne les empêchait pas d'en faire — du commerce — mais c'est une autre affaire !).

9. Il ne saurait faire de doute, Monsieur le président, qu'un traité n'est pas un parchemin figé à jamais dans l'éternel hier, au moment où il a été adopté. Mais l'interpréter est une chose, en modifier le sens voulu par les parties au prétexte d'interprétation, une toute autre chose : «La Cour est appelée à interpréter les traités, non à les reviser.» («It is the duty of the Court to interpret the Treaties, not to revise them.») (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950*, p. 229 ; voir aussi *Droits des ressortissants des Etats-Unis d'Amérique au Maroc (France c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1952*, p. 196.) Or l'interprétation avancée par le Costa Rica non seulement défie le sens commun — des touristes ne peuvent être assimilés à des «objets de commerce», à des marchandises — mais encore, elle ne pouvait être envisagée par les Parties il y a un siècle et demi alors que le tourisme n'avait aucunement la signification et l'importance économiques qu'il a aujourd'hui et était, à vrai dire, sans rapport aucun avec le commerce. Comme l'écrivait un auteur français en 1892 : «Le tourisme ... se résume tout entier en un seul mot : voir»[76]. L'*American Dictionary of the English Language* datée de 1857 n'inclut pas le mot «tourism», mais seulement le terme «tourist» qu'il définit comme : «One who makes a tour or performs a journey in circuit»[77]. Et en 1914, année où le mot «turista» a fait son apparition dans le dictionnaire de l'Académie

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[74] MCR, vol. 2, annexe 18.

[75] Voir aussi CMN, p. 161, par. 4.1.35-4.1.36 ; DN, p. 106-107, par. 3.16, p. 108-128, par. 3.19-3.49 et p. 129-130, par. 3.52.

[76] Baudry de Saunier — cité *in Trésor de la langue française informatisé (TLFi)*, online <http://atilf.atilf.fr/tlf.htm> (mot clé : tourisme).

[77] N. Webster, *The American Dictionary of the English Language*, Harper and Brothers, New York, 1857, p. 1039.

royale espagnole, sa définition se lisait ainsi : «Voyageur qui parcourt un pays pour se distraire et pour son plaisir.» Pas le moindre lien avec le commerce décidemment.

10. Le glissement de sens opéré par le Costa Rica — intolérable en termes d'interprétation — serait d'autant plus inacceptable qu'il aurait pour effet de limiter considérablement (et d'une manière imprévue) les avantages que le Nicaragua tient de sa souveraineté sur le fleuve : comme cela a été rappelé avec force dans la sentence arbitrale de 1951 dans l'affaire du *Sheikh d'Abu Dhabi*[78] et réaffirmé par la Cour dans celle du *Plateau continental de la mer Egée*, il convient de «présumer qu'une personne qui cède des droits de propriété de grande valeur n'entend disposer que des droits qu'elle possède au moment de la cession» (*Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77) ; tel était, à l'évidence, le cas du Nicaragua, dont on ne peut pas présumer qu'il ait cédé au Costa Rica des droits dont personne n'envisageait l'existence en 1858, alors qu'ils sont devenus, un siècle et demi plus tard, un enjeu économique non négligeable.

11. Autrement dit, Monsieur le président, même si «con objetos de comercio» pouvait vouloir dire «à des fins commerciales» — ce que je ne concède que pour les besoins de la discussion — à l'époque, cette expression ne visait que le transport des marchandises, à l'exclusion des personnes. Comme cela ressort très nettement des traités contemporains d'amitié, de commerce et de navigation conclus par le Nicaragua avec des Etats tiers et invoqués par le Costa Rica[79], lorsque ces Etats voulaient inclure le transport des passagers dans leurs transactions conventionnelles, ils ne manquaient pas de le préciser. En tout état de cause, je le répète, nul n'envisageait alors que les touristes pussent être des «objets de commerce» et même à notre époque mercantile, ce n'est guère acceptable.

12. J'ajoute à cet égard que l'affirmation adroitement ambiguë du professeur Kohen selon laquelle, «[d]ans l'affaire *Kasikili/Sedudu*, votre Cour a rappelé que le Botswana et la Namibie avaient interprété la notion de liberté de navigation comme incluant la navigation touristique»[80], ne signifie sûrement pas qu'il existe un droit général à la navigation touristique sur les fleuves

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[78] Sentence arbitrale, 28 août 1951, *Petroleum Development Ltd contre Sheikh of Abu Dhabi*, *ILR*, vol. 18, 1951, p. 150-152.

[79] Voir CR 2009/2, p. 60-61, par. 49-51 (Kohen).

[80] CR 2009/2, p. 56, par. 34.

partiellement internationaux. Pour reconnaître au Bostwana la liberté de navigation sur la Chobé, y compris pour les touristes, la Cour s'est en effet fondée non pas sur un imaginaire principe général de droit, mais sur l'accord des Parties constitué par les déclarations des deux Etats en plaidoiries, confirmant le communiqué de Kasane adopté le 24 mai 1992 par les présidents de la Namibie et du Botswana aux termes duquel : «la navigation devait rester sans entrave et, entre autres, les touristes devaient pouvoir se déplacer librement» (*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1107, par. 102 ; voir aussi, *ibid.*, Opinion individuelle du juge Kooijmans, p. 1150, par. 29). Puis-je suggérer que l'on ne se trouve pas à proprement parler dans ce cas de figure en la présente espèce ?

II. L'inexistence de la pratique et ses conséquences

13. Monsieur le président, j'en viens maintenant à la seconde partie de mon exposé, sur l'interprétation du traité de 1858 à la lumière de la pratique ultérieure — ou plutôt de l'absence de pratique ultérieure, car c'est bien de cela qu'il s'agit : le droit de navigation «avec des marchandises» ou même, plus largement, «à des fins commerciales», revendiqué aujourd'hui avec tant d'apparente conviction par le Costa Rica, n'a fait entre 1858 et le moment où est né le présent différend (au plus tôt en 1980 — en réalité à la fin des années 1990), l'objet d'aucune espèce de pratique — en tout cas pas d'une pratique qui permette d'éclairer le sens et la portée des droits de navigation accordés au Costa Rica par l'article VI du traité de limites et allant dans son sens.

14. L'article 31, paragraphe 3 *b)*, de la convention de Vienne de 1969 appelle à tenir compte, dans l'interprétation d'un traité, en même temps que du contexte, «de toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité». Comme l'a noté sir Humphrey Waldock dans son sixième rapport à la CDI sur le droit des traités : «pour qu'une pratique corresponde à son «interprétation authentique», il faut qu'il ressorte de cette pratique que l'interprétation dont il s'agit a recueilli l'assentiment tacite de l'ensemble des parties»[81]. S'agissant d'un traité bilatéral, il suffit, à vrai dire, que la

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[81] CDI, *Annuaire 1966*, vol. II, A/CN.4/186, p. 107, par. 18 ; voir aussi CDI, *Annuaire* 1966, vol. II, p. 241, Projet d'articles sur le droit des traités, par. 15 du commentaire du projet d'article 27 ; Giovanni Distefano, «La pratique subséquente des Etats parties à un traité», *AFDI*, 1994, p. 55, et G. Nolte, «Les traités dans le temps. En particulier : Accord et pratique ultérieurs», Rapport de la CDI sur les travaux de sa soixantième session, 5 mai-6 juin et 7 juillet-8 août 2008, *Documents officiels de l'Assemblée générale, soixante-troisième session, supplément n° 10* doc. A63/10, p. 400, par. 25.

pratique ouverte et constante de l'une des parties ne se heurte pas à une objection de la part de l'autre.

15. Mais, dans le cas qui nous occupe, le Costa Rica ne peut faire état d'aucune espèce de pratique établissant l'accord des Parties en faveur de l'interprétation nouvelle qu'il avance : jusqu'au début des années 1980, c'est d'inexistence de toute pratique allant dans le sens des prétentions costariciennes qu'il faut parler *a)* ; et, lorsque le problème s'est posé, à partir de cette période, c'est au contraire un désaccord constant que l'on constate *b)*.

a) ***L'absence de toute pratique confirmant les prétentions costariciennes***

16. Comme je l'ai rappelé brièvement tout à l'heure[82], Monsieur le président, la clause litigieuse du traité de 1858 n'y a été insérée que parce que le Costa Rica avait besoin de ce droit de navigation (limité aux marchandises) pour assurer l'exportation de son café vers l'Europe. Le professeur Remiro Brotóns l'a rappelé : à cette époque, où le Costa Rica ne disposait ni d'un réseau de chemin de fer adapté, ni d'aucun port sur sa façade caraïbe, l'utilisation du San Juan était le seul moyen d'éviter les frais énormes, les incertitudes et les délais qu'imposait le passage par le cap Horn. Mais l'exercice de ce droit de navigation en vue du commerce des marchandises a perdu tout intérêt commercial et stratégique pour le Costa Rica à la suite de l'abandon des projets de construction d'un canal interocéanique et de l'ensablement de l'embouchure du fleuve qui l'a rendu inutilisable pour le trafic commercial[83]. Le Costa Rica s'est alors tourné vers d'autres voies pour ses exportations via la mer des Caraïbes[84].

17. Il n'est resté sur le San Juan qu'un modeste cabotage qui n'a donné lieu à aucun litige, comme le montre l'absence à peu près totale de correspondance diplomatique à ce propos. La seule exception que j'aie trouvée dans les écritures des Parties est cependant intéressante : il s'agit de la longue lettre du «secrétaire du Parlement» du Nicaragua au ministre costa-ricien des affaires étrangères en date du 27 juillet 1897, lettre protestant contre un décret du Congrès du Costa Rica autorisant «les *vaisseaux marchands* de toute nationalité ... à naviguer sur le fleuve San Juan dans

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[82] Voir *supra*, par. 8 ; voir note 75 et les références citées.

[83] Voir les références citées note 75 ci-dessus.

[84] DN, p. 131, par. 3.54-3.55.

le but de transporter *leur cargaison* jusqu'au sol costa-ricien»[85] il est clair que c'est de marchandises et de cela seulement qu'il s'agissait. Et l'on ne saurait évidemment faire dire le contraire à l'accord du 9 janvier 1956[86], dont l'article premier énonce l'intention des deux Parties d'«accélérer la circulation ... sur le fleuve San Juan» ; cette disposition — dont il est assez curieux de considérer qu'elle «contient deux nouvelles obligations de moyens ... précises»[87] — se borne à renvoyer au traité de 1858 et à son interprétation par l'arbitrage de 1888, mais l'accord de 1956 n'en donne lui-même aucune interprétation. Au demeurant, «faciliter et accélérer la circulation» sur le fleuve ne saurait signifier que le souverain abandonne ses droits souverains sur celui-ci.

18. S'agissant de la sentence de 1888, il est du reste fort significatif que le litige dont les Parties ont saisi le président Cleveland n'a aucunement porté sur la question du droit de navigation du Costa Rica en vertu de l'article VI du traité : aucun des onze «points d'interprétation douteuse» («points of doubtful interpretation») relevés par le Nicaragua dans le traité de limites de 1858 ne concernait ce problème (quant au Costa Rica, il n'en avait remis aucun...)[88]. «Ceci», dit à juste titre le professeur Kohen, «témoigne de l'absence de désaccord sur cette question»[89]. Et c'est bien pour cela qu'il paraît pour le moins hasardeux d'accorder à la traduction de l'expression «con objetos de comercio» faite par les Parties — les deux Parties, je sais ! — à l'occasion de l'affaire portée devant Cleveland, l'importance que le Costa Rica lui prête.

19. Mon contradicteur et ami, Marcelo Kohen, a affirmé sans rire qu'il y avait là «l'expression d'un accord entre les parties quant à l'interprétation de l'expression «con objetos de comercio» contenue dans le traité, intervenue après son entrée en vigueur» — au sens sans doute de l'article 31, paragraphe 3 *a)*, de la convention de Vienne sur le droit des traités, même s'il n'a pas osé citer expressément cette disposition. Monsieur le président, il n'y a eu aucun accord — pour l'excellente raison qu'il n'y avait aucun désaccord ; et, honnêtement, ceci n'a strictement aucun rapport avec la déclaration d'Alger de 1981 entre les Etats-Unis et l'Iran, que mon excellent

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[85] MCR, vol. 3, annexe 37 ; les italiques sont de nous.

[86] Voir CR 2009/2, p. 62, par. 53 (Kohen).

[87] CR 2009/3, p. 54, par. 8 (Kohen).

[88] Lettre de Fernando Guzman au ministre costa-ricien des affaires étrangères, 22 juin 1887, MCR, vol. III, annexe 36 ; sentence du président Cleveland, 22 mars 1888, MCR, vol. II, annexe 16, p. 98.

[89] CR 2009/2, p. 60, par. 47.

contradicteur mentionne — cela doit être le seul précédent qu'il a trouvé en note il est vrai[90]. Il est d'ailleurs révélateur que l'expression «for the purposes of commerce» ait été prudemment mise entre guillemets dans la sentence elle-même, malgré ce prétendu «accord des Parties» — et ceci *de la main même de Cleveland*, ainsi que ceci apparaît dans le projet de sentence préparé par Rives et annoté par le président, qui est reproduit à l'annexe 72 du contre-mémoire du Nicaragua[91]. C'est intéressant car la sentence n'utilise par ailleurs des guillemets qu'à propos d'un problème sémantique qui opposait les Parties : la question de savoir si l'intervention du Costa Rica requise à l'article VIII devait s'analyser en un «avis» ou en une «consultation» *(whether it should be «advisory» or «consultative»)* ; sinon, point de guillemets sauf, comme je l'ai rappelé, pour «purposes of commerce».

20. J'ajoute que, si l'on veut à toute force invoquer les argumentations des Parties soumises au président Cleveland, le Costa Rica a, en cette circonstance, bien expliqué que, pour lui, à l'époque, «con objetos de comercio» (ou «for the purposes of commerce»), cela se limitait «au transport de marchandises proprement dit»[92]. Citant l'article VI du traité, le Costa Rica s'interroge :

> «Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of *transportation of merchandise*?»[93].
>
> *(Cela signifie-t-il que le Costa Rica ne peut en aucun cas naviguer sur lesdites eaux avec des navires d'Etat, que le navire soit à proprement parler un navire de guerre ou simplement une vedette de douanes ou tout autre navire destiné à empêcher la contrebande ou à transporter des ordres aux autorités des districts frontaliers, ou à toute autre fin autre que le transport de marchandises proprement dit ?)*

Le Costa Rica ne manifeste aucun doute sur la signification de l'article VI : il veut obtenir de l'arbitre la reconnaissance de son droit de naviguer avec des navires publics, sinon, se lamente-t-il, il en sera réduit au seul «transport de marchandises». Avec cette interprétation-ci — que le professeur Crawford a reprise à son compte mardi matin[94], nous sommes entièrement d'accord, Monsieur le président ! Peut-être Marcelo Kohen verra-t-il dans cette manifestation de l'accord des Parties «sur ce point, certes chacune de son côté, mais de manière identique, ... l'expression d'un accord entre les parties quant à l'interprétation de l'expression «con objetos de comercio» contenue dans le traité, intervenue après son entrée en vigueur»[95] ?

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[90] *Ibid.*, note 165.

[91] CMN, vol. II, p. 259.

[92] DN, vol. II, annexe 5, Argumentation relative à la question de la validité du traité de limites entre le Costa Rica et le Nicaragua et autres points connexes complémentaires soumise à l'arbitrage du président des Etats-Unis, déposée au nom du Costa Rica, traduction du Greffe, p. 15.

[93] DN, vol. II, annexe 5, Argument on the Question of the Validity of the Treaty of Limits Between Costa Rica and Nicaragua and Other Supplementary Points Connected with it, submitted to the President of the United States of America, Filed on Behalf of the Government of Costa Rica (les italiques sont de nous).

21. L'arbitre a rejeté sur ce point les prétentions du Costa Rica, sauf en ce qui concerne les bateaux du service des douanes, qui peuvent naviguer sur le fleuve «as may be related to and connected with her enjoyment of «purposes of commerce» [«con objetos de comercio»]» («dans la mesure où [cette navigation] est en relation avec, et liée à» — formule fort restrictive, Monsieur le président ! — «la jouissance de...» ; puis suit la fameuse formule entre guillemets «à des fins commerciales». Comme l'a relevé le professeur Kohen[96] cette phrase ne fait pas grand sens en français, que l'on traduise «con objetos de comercio» par «avec des marchandises» ou «à des fins commerciales». Mais, prise à la lettre, elle ne signifie pas non plus grand-chose en anglais : «her enjoyment of the «purposes of commerce»». That's strange ! Ceci n'a pas plus de sens que «sa jouissance «à des fins commerciales»». Il s'agit peut-être d'une simple inadvertance de l'arbitre ; mais il est bien plus probable que le président Cleveland, qui était un fin juriste, a préféré ne pas se lancer dans une interprétation de l'expression «con objetos de comercio» (traduite par «for purposes of commerce» par les parties) et a délibérément choisi de recourir aux guillemets, afin de signifier qu'il utilisait cette expression sans se prononcer sur un problème d'interprétation que les parties ne lui avait pas soumis et sur lequel elles ne s'étaient pas exprimées. Le sens général n'en est pas moins clair : les droits du Costa Rica sont strictement limités à ce qui est lié à la navigation «con objetos de comercio» et, comme l'avait fort justement relevé l'argumentation costa-ricienne de 1887, cela exclut «toute autre fin ... que le transport de marchandises proprement dits».

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[94] CR 2009/3, p. 10, par. 11.

[95] CR 2009/2, p. 60, par. 47 (Kohen).

[96] *Ibid.*, p. 63, par. 58.

22. Bien que le Costa Rica la passe pudiquement sous silence, je rappelle également[97] que la première sentence arbitrale d'Alexander, de 1897, va également dans le sens de l'interprétation soutenue par le Nicaragua : il y présente avec insistance le fleuve San Juan comme un «débouché pour le commerce» *(an outlet for commerce)*, expression qui vise clairement le commerce «avec des marchandises».

23. Monsieur le président, nos amis, de l'autre côté de la barre, font grand cas du jugement rendu le 30 septembre 1916 par la Cour de justice centraméricaine : le professeur Caflisch s'y est attardé près d'un quart d'heure lundi[98], et quoiqu'un peu moins prolixe, son collègue Marcelo Kohen s'y est également arrêté[99]. Le Nicaragua a toujours considéré que cet arrêt était nul et de nul effet, comme l'ambassadeur Argüello Gomez l'a rappelé[100]. Mais, peu importe à vrai dire ; en ce qui nous concerne pour le moment, il appelle la même analyse que la sentence Cleveland :

- le problème que le Costa Rica avait soumis à la Cour ne concernait nullement l'interprétation de l'expression «con objetos de comercio», mais était lié à la construction d'un canal interocéanique ;
- sans doute est-il exact que la Cour de justice centraméricaine a cependant cru devoir, à cette occasion, se livrer à une analyse plus globale du traité, mais, comme l'a relevé mon éminent contradicteur et ami[101], la Cour s'est, pour ce qui est de l'interprétation de l'article VI, bornée à paraphraser la sentence Cleveland ;
- et ce qu'elle en dit ne présente strictement aucun intérêt pour comprendre le sens de l'expression «con objetos de comercio» :

> «et, troisièmement, le Costa Rica possède sur le fleuve San Juan, aux fins du commerce, de[s] droits permanents de libre navigation depuis l'embouchure du fleuve jusqu'à trois milles en aval de Castillo Viejo, et le droit pour ses navires de mouiller en tous points sur les deux rives, sans qu'aucun droit puisse leur être imposé, dans la partie du fleuve où la navigation est commune»

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[97] Voir en particulier DN, p. 134-137, par. 3.65-3.68.

[98] CR 2009/2, p. 37-42, par. 24-37.

[99] *Ibid.*, p. 63-64, par. 59-60.

[100] Voir aussi CMN, p. 131, par. 3.2.6, ou DN, p. 62, par. 2.95, et p. 79-81, par. 2.124-2.128.

[101] CR 2009/2, p. 39, par. 28 (Caflisch) ; voir aussi par. 31, et p. 43, par. 43.

> *(«and, third, Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common»)*[102] ;

et c'est tout…

24. C'est tout — car je crains que le professeur Kohen ait lu trop rapidement l'arrêt de 1916 ou qu'il tente de lui faire dire très abusivement quelque chose qu'il ne dit pas, lorsqu'il annonce, peut-être un peu trop triomphalement : «Dans son arrêt de 1916, la Cour de justice centraméricaine évoque «le droit indiscutable [du Costa Rica] de naviguer librement sur le fleuve» et, paraphrasant l'article VI, utilise la formule synonyme espagnole «para fines comerciales» pour expliquer ce que cet article entend par «con objetos de comercio».»[103] Eh non, mon cher ami, *ce n'est pas* «la Cour de justice centraméricaine» qui évoque ce soi-disant (et trop large) droit, c'est «l'avocat de la haute partie défenderesse» *(the attorney of the high party complainant)* — c'est-à-dire le Costa Rica ! La Cour pour sa part n'a pas repris cette prétendue (et audacieuse) «paraphrase» à son actif...

25. Il reste, Monsieur le président, que le différend porté devant la Cour centraméricaine ne portait assurément pas sur l'interprétation de cette formule. Et ceci confirme que la Partie costa-ricienne affirme peut-être un peu légèrement que le Nicaragua transforme son droit de navigation «con objetos de comercio» en «un droit purement nominal, une enveloppe vide, en somme»[104] — comme l'a dit M. Caflisch. C'est là, à vrai dire, une phrase assez «convenue» et qu'aucune pratique diplomatique ou jurisprudentielle ne vient confirmer. Le Costa Rica n'est d'ailleurs pas en mesure de produire le moindre document reflétant un seul incident, en cent cinquante ans, lié à une quelconque atteinte de la part du Nicaragua à son droit de libre navigation avec des marchandises *(con objetos de comercio)*. Les controverses soumises à des tiers sur l'application de ce traité frontalier n'ont pas davantage porté sur cette question — qui est, en revanche, au centre du présent différend.

26. La pratique bien plus que séculaire d'application du traité est celle d'un trafic local de marchandises et cette interprétation, que reflète cette paisible pratique, n'a été interrompue que

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[102] MCR, vol. II, annexe 21, p. 219.

[103] CR 2009/2, p. 53, par. 69 (Kohen).

[104] *Ibid.*, p. 33, par. 7 (Caflisch). Voir aussi RCR, p. 91, par. 3.140 ou CR 2009/3, p. 23, par. 7 (Caflisch).

lorsque le Costa Rica a prétendu passer du transport des marchandises aux services touristiques. Cette prétention s'est heurtée à une réponse immédiate du Nicaragua ne laissant aucun doute sur le refus de celui-ci d'accepter une telle interprétation. Cette prise de position n'avait jamais été nécessaire auparavant puisque la mise en œuvre du droit de navigation limité reconnu au Costa Rica par l'article VI du traité Cañas-Jérez n'avait jamais fait problème.

b) *Les conséquences de l'absence de pratique pertinente*

27. Monsieur le président, les quelques incidents qui se sont produits entre 1980 et la fin des années 1990 sont restés isolés et sporadiques. Dans son mémoire, le demandeur les a décrits comme «*ad hoc* et temporaires»[105] («of an ad hoc and temporary character»). Il reste que ces quelques incidents et les positions prises par les Parties en ces occasions témoignent, contrairement à la pratique antérieure, non pas d'un accord, mais du nouveau et profond désaccord qui les oppose maintenant quant à l'interprétation du traité de 1858 en général et à l'étendue du droit de libre navigation «con objetos de comercio» en particulier.

28. L'incident dont une note nicaraguayenne de 1980[106] fait état et ceux ayant donné lieu à des échanges de notes entre les deux pays entre 1982 et 1983[107] se sont déroulés dans le climat de guerre civile que l'on sait au Nicaragua[108]. Afin d'assurer la sécurité et de la navigation et de sa frontière, le Nicaragua décida alors de mettre en place une règlementation plus rigoureuse pour la navigation sur le fleuve — cette règlementation était générale et ne visait pas spécifiquement le Costa Rica ou ses ressortissants. Il ressort néanmoins clairement de la note verbale du chargé d'affaires du Nicaragua au Costa Rica du 2 août 1982, que le Nicaragua n'entendait pas «to deny in any way the rights of free navigation on the San Juan River ... which were granted to the sister Republic of Costa Rica in the Treaty of Limits of 15 April 1858» (nier en aucune façon les droits de libre navigation sur le fleuve San Juan ... qui ont été octroyés à la République sœur du

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[105] MCR, p. 27, par. 3.04.

[106] MCR, vol. III, annexe 40.

[107] MCR, vol. III, annexes 41-43.

[108] Cf. CR 2009/3, p. 35, par. 6 (Kohen).

Costa Rica par le traité de limites du 15 avril 1858)[109]. Mais ceci n'informe pas sur le contenu prêté à ces droits par les Parties.

29. L'échange de notes de 1982-1983[110] n'en révèle pas moins l'existence d'un désaccord profond entre les deux pays quant à l'étendue de ce droit de libre navigation ou, plus exactement, du droit souverain du Nicaragua de réglementer sur son territoire la navigation — droit sur lequel M^e Reichler reviendra demain. Les deux Parties campant sur leur position respective, il est clair qu'aucun «accord entre les parties» quant à l'interprétation du traité ne peut être déduit de ces incidents.

30. Après une longue période sans incident notable, ce désaccord a resurgi en 1994 lorsque les autorités nicaraguayennes ont introduit (de manière indiscriminée) l'exigence de cartes de touristes. Aux protestations du Costa Rica contre toute mesure visant à restreindre son «droit de libre navigation» (tout court !), le ministre des affaires étrangères nicaraguayen oppose la limitation matérielle du droit de navigation reconnu par le traité de 1858, en soulignant notamment que «l'expression «con objetos de comercio» qui figure dans le traité exclut tout autre activité» et qu'

> «il ne faut pas oublier que le droit perpétuel de libre navigation du Costa Rica dans la portion du fleuve définie dans le traité n'englobe pas le tourisme et encore moins le libre accès au territoire souverain du Nicaragua de ressortissants étrangers qui voyagent à bord de bateaux costa-riciens naviguant sur ledit fleuve «pour transporter des touristes» (con el objeto de transportar turistas)…»[111]
>
> («we must remember that Costa Rica's perpetual right of free navigation, in the portion indicated in the Treaty does not include tourism, and much less the free access to Nicaragua's sovereign territory to foreign citizens who travel in Costa Rican vessels that navigate on said River, for the purpose of transporting tourists) (con el objeto de transportar turistas) …»).

Le désaccord ne pouvait être plus clair.

31. Et le communiqué Cuadra-Lizano du 30 juillet 1998[112], dont le Costa Rica fait aussi ses choux gras[113], appelle les mêmes remarques. Cet instrument ne constitue pas un «accord

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[109] MCR, vol. III, annexe 44.

[110] MCR, vol. III, annexes 44-47.

[111] MCR, vol. III, annexe 48, par. 3 ; voir aussi le paragraphe 2.

[112] MCR, vol. II, annexe 28.

[113] Voir CR 2009/2, p. 23, par. 6 (Ugalde), p. 26, par. 14 (Ugalde), p. 41-42, par. 38-40 (Caflisch) ; CR 2009/3, , p. 18, par. 38 (Crawford).

valablement conclu»[114] : il s'agit d'un texte qui d'ailleurs ne se suffit pas à lui-même[115], par lequel les signataires se «déclarent résolus» à donner des «instructions» (orders) «à leurs subordonnés respectifs» («for their respective subordinates») mais sur ce point, je me permets, Messieurs de la Cour, de renvoyer à nos écritures[116]. En tout état de cause, ce communiqué ne confirme en aucune manière «*the long-standing practice of Costa Rican police navigation with arms and laid down modalities for its continuation*»[117], mais, au contraire, ce communiqué envisage de *nouvelles* pratiques jugées propres «à remédier aux incidents regrettables» («to resolve the regrettable inconveniences») des derniers jours. En outre, il ne donne aucune espèce d'indication sur la consistance et l'étendue des droits de navigation du Costa Rica : les deux signataires se bornent à «exprimer leur respect» aussi bien pour ces droits de navigation que pour «le *dominium* et l'*imperium* exclusifs du Nicaragua *sur l'ensemble du San Juan*» («the *dominium* and sovereign jurisdiction of Nicaragua over the entire San Juan River») — expression qui mérite d'ailleurs d'être relevée au passage. Quel que soit son statut juridique, ce communiqué conjoint ne règle rien et n'élucide rien.

32. En paraphrasant l'arrêt de la Cour de 1999 dans l'affaire de l'*Ile de Kasikili/Sedudu*, on peut dire que

> «[d]e l'ensemble de ces éléments, [on ne peut que conclure] que les événements ci-dessus rapportés, qui se sont déroulés entre [1980 — ou 1998 — et aujourd'hui], révèlent l'absence d'accord entre [le Costa Rica et le Nicaragua] sur [l'interprétation de l'article VI du traité de 1958]. Ces événements ne sauraient dès lors être constitutifs d'une «pratique ultérieurement suivie dans l'application du traité [de 1858] par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité» (convention de Vienne de 1969 sur le droit des traités, art. 31, par. 3, al. *b)*). A fortiori ne peuvent-ils avoir donné lieu à un «accord ... entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions» (*ibid.*, art. 31, par. 3, al. *a)*).»
>
> («[f]rom all of the foregoing, [it can only be concluded] that the abovementioned events, which occurred between [1980 and nowadays], demonstrate the absence of agreement between [Costa Rica and Nicaragua] with regard to the [interpretation of Article VI of the 1858 Treaty]. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1858] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna convention on the Law of

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[114] CR 2009/2, p. 46, par. 49 (4) (Caflisch).

[115] Cf. le paragraphe 3 du communiqué.

[116] CMN, p. 134-136, par. 3.2.11-3.2.13 ; DN, p. 77-78, par. 2.121-2.123 ; voir aussi CMN, vol. II, annexe 68.

[117] CR 2009/2, p. 23, par. 6 (Ugalde).

> Treaties, Art. 31, para. 3 *(b)*). *A fortiori*, they cannot have given rise to an «agreement between the parties regarding the interpretation of the treaty or the application of its provisions» (*ibid.*, Art. 31, para. 3 *(a)*).» (*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1087, par. 63.)

33. Monsieur le président, trois points de conclusion, si vous me le permettez malgré l'heure avancée.

34. *En premier lieu*, le texte comme le contexte dans lequel l'expression «con objetos de comercio» est utilisée à l'article VI du traité Cañas-Jérez, ne peuvent laisser aucun doute sur le fait que cet instrument n'octroie un droit perpétuel de libre navigation au Costa Rica que pour le transport des marchandises. Je ne parle malheureusement pas espagnol — même si je le lis tant bien que mal ; mais je dois dire, Monsieur le président, que pour le francophone que je suis l'idée que «avec des objets (ou des articles) de commerce» pourrait signifier «à des fins commerciales» est aberrante : en français en tout cas, on ne peut pas faire précéder «fins» de la préposition «avec» ; «à» ou «pour», oui — mais «avec des fins» (*con los fines* — si cela signifie quelque chose dans la langue de Vitoria ?), vraiment non ! ou «avec des objets» (dans le sens de «fins»), encore moins ! Et le Costa Rica ne pourrait certainement pas obtenir par le biais d'une interprétation évolutive, très excessive, ce que le sens clair des mots ne lui donne pas — et ce d'autant moins qu'il s'agit tout de même, quoiqu'en disent nos contradicteurs, de limiter les droits souverains que le Nicaragua tire de son *summum imperium* sur les eaux du fleuve.

35. *En deuxième lieu*, il n'est, au demeurant, sans doute pas même utile que la Cour se prononce sur ce point. Comme l'a très justement relevé la Commission chargée de la *Délimitation de la frontière entre l'Erythrée et l'Ethiopie*,

> «[t]he function of [the subsequent practice or conduct of the Parties] is not, it must be emphasised, relevant exclusively to the interpretation of the Treaties. It is quite possible that practice or conduct may affect the legal relations of the Parties even though it cannot be said to be practice in the application of the Treaty or to constitute an agreement between them.»[118]

Dans cette perspective, quel qu'ait pu être le sens que les Parties avaient, initialement, voulu donner à l'expression «con objetos de comercio», on peut déduire de cette très longue pratique, sur ce point paisible, qu'aujourd'hui la formule signifie : le droit du Costa Rica à une navigation de cabotage, sans taxe ni entraves autres que celles rendues nécessaires par les nécessités de la sécurité et de l'ordre publics, et ne portant que sur des marchandises.

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[118] Décision du 13 avril 2002, *Délimitation de la frontière entre l'Erythrée et l'Ethiopie*, *RSA*, vol. XXV, p. 110, par. 3.6. Voir aussi, par exemples, *Emprunts brésiliens, arrêt n° 15, 1929, C.P.J.I. série A n° 21*, p. 38 ; *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 22-24 ; *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 22, par. 21 et 22.

36. *En troisième lieu* et enfin, les désaccords des deux dernières décennies, loin de démentir cette conclusion, la confirment résolument : après tant d'années de totale abstention, le Costa Rica s'est essayé à élargir subrepticement, par petites touches, le sens et la portée de l'article VI ; ses prétentions se sont aussitôt heurtées à une opposition nette, constante et totale, du Nicaragua, ce qui interdit évidemment d'y voir une quelconque pratique confirmant l'interprétation impossible que la Partie costa-ricienne voudrait, Messieurs les juges, vous faire entériner.

Monsieur le président, ceci conclut les plaidoiries du Nicaragua pour ce matin. Et je vous remercie vivement, Messieurs de la Cour, de leur avoir prêté attention tout en vous présentant mes excuses pour le tout petit dépassement d'horaire.

The PRESIDENT: I thank Professor Pellet for his presentation. The sitting is adjourned until tomorrow morning when the Court resumes its sitting at 10 o'clock.

The Court rose at 1.05 p.m.

CR 2009/5

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2009

Public sitting

held on Friday 6 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights**
(Costa Rica *v.* Nicaragua)

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le 6 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes**
(Costa Rica c. Nicaragua)

COMPTE RENDU

Present:	President	Owada
	Judges	Shi
		Koroma
		Al-Khasawneh
		Buergenthal
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Judge *ad hoc*	Guillaume
	Registrar	Couvreur

The Government of the Republic of Costa Rica is represented by:

H.E. Mr. Edgar Ugalde-Alvarez, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

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as Agent and Counsel;

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Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, Chair of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the continuation of the first round of oral argument of the Republic of Nicaragua. Now, this morning I am going to invite Mr. Reichler to take the floor as the first speaker.

Mr. REICHLER:

NICARAGUA'S LAWFUL REGULATION OF NAVIGATION ON THE SAN JUAN RIVER

1. Mr. President, distinguished Members of the Court, it is always an honour for me to appear before this great Court. I am especially privileged today to speak on behalf of the Republic of Nicaragua.

2. It is my role to discuss Nicaragua's regulation of navigation on the San Juan River, and to demonstrate that it has been lawful in all respects, and in particular that it has not violated Costa Rica's rights under the Treaty of Limits of 1858.

3. I will make three fundamental points. *First*, the Treaty of Limits, which by its express language recognizes that Nicaragua *exclusively* has "dominio" and "sumo imperio" over the San Juan River, necessarily bestows upon Nicaragua, as the exclusive holder of sovereign authority over the river, the police power to regulate activities on or pertaining to the river, including the manner in which navigation is conducted.

4. *Second*, there is no inherent contradiction between Nicaragua's right to regulate navigation, in her capacity as sovereign over the river, and Costa Rica's right to free navigation "con objetos de comercio". Nicaragua's regulation of navigation, far from negating or diminishing Costa Rica's freedom of navigation, is fully compatible with it under long-established principles of international law and practice.

5. *Third*, the evidence proves that, in practice, Nicaragua has regulated navigation on the river, including navigation by Costa Rica, in a reasonable and non-discriminatory manner. As a consequence, Costa Rica's claim that Nicaragua's regulations violate her right of free navigation "con objetos de comercio" must fail.

A. The 1858 Treaty establishes Nicaragua's exclusive sovereignty over the San Juan River, which necessarily endows her with the power to regulate navigation

6. I begin with the first point: Nicaragua's power to regulate navigation on the San Juan River. Article VI of the Treaty of Limits states that Nicaragua "shall have exclusively the dominion and sovereign jurisdiction" over the waters of the river San Juan "but that the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters . . . said navigation being for the purposes of commerce [con objetos de comercio]". Now, the term "objetos de comercio" has been the subject of sustained debate. I will not revisit it. Instead, I will proceed from the premise that regardless of the meaning that the Court ultimately attributes to the phrase "con objetos de comercio", and even if for purposes of argument "con objetos de comercio" means "for commercial purposes", Nicaragua still has the right to regulate Costa Rican navigation on the San Juan River.

7. Costa Rica's argument that Nicaragua does not have this right is a simple one: she claims that under Article VI she has the right to *free* navigation. And according to Costa Rica, "free" means free in the most absolute sense possible. This is what she says in her Memorial:

> "Costa Rica's perpetual right of free navigation is the right to navigate freely, without impediments, conditions, restrictions or charges or duties of any kind. Any interference, whether in the form of *regulations*, impediments, charges or restrictions or any condition that might be imposed is a violation of that right."[1]

At these hearings, Professor Caflisch expressed the view that Costa Rica's right of free navigation is "absolute" and "unconditional"[2].

8. The problem with Costa Rica's argument is that it is based on a highly selective reading of the text of Article VI. In particular, Costa Rica treats the language pertaining to her right to navigate on the San Juan in complete isolation from the rest of the Article, and, indeed, she divorces it from the rest of the same sentence of the Article that includes her right of navigation. It is as if, for Costa Rica, the entire sentence, if not all of Article VI, exists solely and exclusively to confer upon her an absolute and unconditional right of free navigation on the river. But that view is not consistent with the Treaty language. The key sentence of Article VI — the one in which Costa Rica's right of navigation is found — *begins* with the declaration that Nicaragua has

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[1] Memorial of Costa Rica (MCR), para. 4.16.

[2] CR 2009/3, para. 35; p. 23, para. 7; p. 30, para. 23; p. 31, para. 26; p. 33, para. 33.

"exclusively the dominion and sovereign jurisdiction [exclusivamente el dominio y sumo imperio] over the waters of the San Juan River". The sentence then continues with the word "but" ("pero" in Spanish), which introduces the dependent clause that "the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters . . . said navigation being for the purposes of commerce [con objetos de comercio]".

9. Nicaragua recognizes, of course, and has never denied, that Article VI gives Costa Rica a right of free navigation on the San Juan River "con objetos de comercio". But Article VI makes it clear that this right of Costa Rica exists within the overall context of Nicaragua's exclusive dominion and sovereign jurisdiction over the river. The real difference between the two Parties in this case is that Nicaragua recognizes Costa Rica's right to navigate "con objetos de comercio", but Costa Rica effectively disregards Nicaragua's exclusive dominion and sovereign jurisdiction over the river, paying it no more than lip service at best. When Professor Caflisch argues that Costa Rica's right of free navigation under Article VI is "absolute" and that "it exists for Costa Rica independently of the rights of others", such that her navigation is exempt from regulation by Nicaragua, he is in effect reading out of the Treaty Nicaragua's exclusive dominion and sovereign jurisdiction over the river[3].

10. The words in Spanish, which the drafters of the 1858 Treaty used to express the power that Nicaragua was to have "exclusively" are "dominio", dominion, and "sumo imperio"[4]. One need not be a famous Latin scholar, like my good friend Professor Pellet, to recognize that "sumo imperio" is a classical formulation derived from the Latin *summum imperium* or *imperium summum*. It connotes the very highest level of sovereign authority. According to a contemporary Spanish source, the *Enciclopedia Moderna — Modern Encyclopedia* — published in Madrid in 1855:

> "[T]he state, designated with the generic names *civitas* and *republica*, whether monarchical, aristocratic or democratic in government, once constituted is not subjected to any other person, nor any other state; it could freely do anything necessary for its conservation, without anyone having the right to prevent it from

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[3] CR 2009/3, p. 23, para. 7.

[4] 1858 Treaty of Limits, Art. VI.

> exercising its rights, being accountable only to God . . . This is what is called *imperium summum*."[5]

11. If Nicaragua's exclusive "sumo imperio" over the river is given its natural and ordinary content, especially as it was understood by the authors of the Treaty in 1858, it must *necessarily* include the right to issue laws and regulations regarding activities on the river, including, especially, navigation. To be sure, in exercising her sovereign regulatory power over river navigation, Nicaragua may not deprive Costa Rica of her right of free navigation "con objetos de comercio" under the Treaty, either directly, or by imposing requirements that are unreasonable, arbitrary or discriminatory. In this way, the rights of both States under the Treaty are preserved, and given their full measure of expression.

12. In her written pleadings, Costa Rica has argued: "Article VI makes Nicaragua's dominion and sovereign jurisdiction over the River conditional upon the Costa Rican perpetual rights of free navigation."[6] To Costa Rica, Nicaragua's sovereignty is "conditional", while her own right is, as Professor Caflisch described it, "unconditional". In this manner Costa Rica turns the logic and the language of Article VI on its head. The plain language of that Article makes it clear that Nicaragua's sovereignty, her "sumo imperio", is not conditioned on Costa Rica's navigational rights. To the contrary, Costa Rica's right of free navigation exists within the context of Nicaragua's exclusive *summum imperium*.

13. Professor Caflisch accuses Nicaragua of advocating a so-called "hierarchy of rights" in which Costa Rica's rights are subordinated to those of Nicaragua[7]. But, with respect, that misses the point. What Nicaragua seeks is recognition and full expression of the Article VI rights of *both* Parties, including her own express right to exclusively exercise the power of "dominio" and "sumo imperio" over the river. To deny Nicaragua the police power to regulate navigation would be to diminish her sovereignty, her *summum imperium*, which the Treaty has given to her exclusively. In

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[5] Francisco de Paula Mellado, *Enciclopedia Moderna: Diccionario Universal de Literatura, Ciencias, Artes, Agricultura, Industria, y Comercio*, Tomo 32 (Madrid, 1855), p. 513, available at http://books.google.com/books?id=3qfK1Adqlm8C&pg=RA3-PA508-IA1&dq=Mellado+Enciclopedia+moderna+imperium+summum&lr=lang_es&num=30&as_brr=0&as_pt=ALLTYPES&ei=WACrSdLFNoPWMJze5M0I (Original Spanish text: "Segun ellos [los escritores eminentes del siglo pasado], el estado que designaban con los nombres genéricos *civitas y republica*, y fuese monárquico, aristocrático ó democrático su gobierno, una vez constituido no está sujeto á ninguna persona, ni á ningun otro estado; puede hacer libremente cuanto sea necesario para su conservacion, sin que nadie tenga derecho á impedirselo ni á residenciarle por el ejercicio de sus derechos, siendo justiciable para Dios, pero de ningun modo para los hombres. Esto es lo que se llamaba *imperium summum*.")

[6] MCR, para. 4.06.

[7] CR 2009/3, p. 22, paras. 2-6; p. 33, para. 33.

effect, this would establish the very hierarchy of rights that Professor Caflisch says is unacceptable, except in the opposite direction; it would subordinate Nicaragua's sovereignty over the river to Costa Rica's right of navigation. By contrast, recognizing Nicaragua's sovereign right of regulation does not diminish Costa Rica's Treaty rights, provided that Nicaragua exercises her power to regulate navigation in a reasonable, non-arbitrary and non-discriminatory manner. To state the matter succinctly, the only way to give proper recognition and complete expression to the rights of both Parties is to acknowledge Nicaragua's right to regulate navigation on a river over which she is the unchallenged and exclusive sovereign, subject to the proviso that she may not deny Costa Rica's right of free navigation "con objetos de comercio" by imposing upon her any requirements that are unreasonable, arbitrary or discriminatory.

B. Costa Rica's right to "free" navigation is not exempt from regulation by Nicaragua

14. I come now to my second point, which is that there is no inherent contradiction, in doctrine or practice between Nicaragua's right to regulate navigation as the sovereign power over the river, and Costa Rica's right under the 1858 Treaty to freedom of navigation "con objetos de comercio". My esteemed colleague and friend, Ian Brownlie, addressed this subject yesterday, and I will not go over ground he has already covered; however, I will cite some additional authorities for the purpose of further disproving Costa Rica's argument that her right to freedom of navigation "con objetos de comercio" necessarily excludes or negates Nicaragua's power to regulate that navigation. The sources are clear: there is nothing incompatible between navigation that is "free" and regulation of that navigation. In fact, this is the norm in State practice. While Professor Caflisch insisted several times that Costa Rica's right of free navigation necessarily renders any attempt by Nicaragua to regulate it unlawful, he did not explain why this must be so. The relevant authorities are to the contrary. They confirm that the right of a State to "free" navigation does not entitle it to escape or avoid regulation — reasonable regulation — by the State that is sovereign over the watercourse.

15. I should mention that I invoke these authorities *not* to argue that any of them has the force of law or is otherwise directly applicable in this case which, both Parties agree, turns on the interpretation to be given to the terms of the Treaty of 1858 and the Cleveland Award. Instead,

their relevance lies in disproving the core premise of Costa Rica's argument: that navigation that is "free" is, by definition, exempt from all regulation.

16. I start with a reference drawn from the frequently cited treatise by Professors Lowe and Churchill, *The Law of the Sea*, which captures the point succinctly. In a section describing navigation on a State's *internal* waters, the authors write:

> "Treaties or unilateral declarations allowing free navigation, *subject always to regulations imposed by riparian States*, have at various times been made in respect of many major rivers around the world and a multilateral treaty to this effect — the Barcelona Convention on the Regime of Navigable Waterways of International Concern — was concluded in 1921, although it has not been widely ratified."[8]

17. The Barcelona Convention is, indeed, a good example[9]. Article 3 of the Statute on the Regime of Navigable Waterways of International Concern, which is annexed to and made part of the Convention, creates a right of "free exercise of navigation"[10]. Article 6 then provides that each of the Contracting States nevertheless maintains its existing rights regarding the navigable waterways under its sovereignty:

> "to enact the stipulations and to take the measures necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration, and to the import or export of prohibited goods, it being understood that such stipulations and measures must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the Contracting States, including the State which is their author, and must not without good reason impede the freedom of navigation".

18. This is but one of many examples that could be given that the right to the "free exercise of navigation" does not exclude regulation by the State that is sovereign over the watercourse, provided that the pertinent regulations are both reasonable and non-discriminatory, and applicable with equal force to the State promulgating the regulations. The principle was already well-established in the nineteenth century. The Resolution of Heidelberg for example, adopted by the Institut du Droit International, in 1887, provided in Article 3 that: "The navigation on the whole course of international rivers, from the point where each of them becomes navigable, to the

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[8] R. R. Churchill & A. V. Lowe, *The Law of the Sea* (1983), p. 48.

[9] Barcelona Convention, available at, http://www.fao.org/DOCREP/005/W9549E/w9549e02.htm#bm02.2 (last visited 26 February 2009).

[10] Art. 3: "Subject to the provisions contained in Articles 5 and 17, each of the Contracting States shall accord free exercise of navigation to the vessels flying the [illegible] any one of the other Contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority."

sea, is entirely free, and cannot, as regards commerce, be forbidden to any flags."[11] At the same time, Article 20 provided for the collection of customs duties by the State with sovereignty over the waters, Article 23 provided for quarantine and sanitary controls "by the initiative of the riparian States", and Article 30 provided for a riparian Commission "to elaborate the regulations for river police"[12]. The 1936 Montreux Convention, which remains in force and governs navigation through Turkish waters in the Bosporus and the Dardanelles, provides in Article I: "The High Contracting Parties recognize and affirm the principle of freedom of transit and freedom of navigation by sea in the Straits."[13] That sentence is followed immediately by this one: *"The exercise of this freedom — the exercise of this freedom — shall henceforth be regulated by the provisions of the present Convention."*[14] No contradiction is perceived between the exercise of the freedom of navigation and its regulation.

19. The International Law Association's 2004 revisions to the 1966 Helsinki Rules on International Water Resources (known as the "Berlin Rules") are a recent affirmation of the same principle: that freedom of navigation does not mean freedom from reasonable regulation. According to Article 43 (1) of the Berlin Rules:

> "Subject to the limitations or qualifications in this Chapter, each riparian State is entitled to freedom of navigation on the entire watercourse to which they are riparian on a basis of equality and nondiscrimination."[15]

Then, Article 45, which is captioned "Regulating Navigation", states:

> "In order to achieve good order in the navigable portion of a watercourse within its jurisdiction, a riparian State may regulate, limit, or suspend navigation, as appropriate for the purposes of protection of public safety, health, or the environment, over that portion of the watercourse within its jurisdiction, provided the State does not discriminate against the shipping of another riparian State and does not unreasonably interfere with the enjoyment of the rights of freedom of navigation . . ."[16]

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[11] Resolution of Heidelberg, Art. 3. English translation in Kaeckenbeeck, *International Rivers: A Monograph Based on Diplomatic Documents* (1920), pp. 46-58.

[12] *Ibid.*

[13] Montreux Convention Regarding the Regime of the Turkish Straits (1936), Art. I.

[14] *Ibid.*

[15] International Law Association, *Berlin Rules on Water Resources Law* (2004), available at http://www.waterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.

[16] *Ibid.*

20. It is true that the instruments I have just discussed, which resulted from lengthy processes of multilateral negotiation or detailed discussion by learned bodies, provide expressly for regulation of navigation by the sovereign, as well as freedom of navigation for other States. It is also true that the 1858 Treaty between Nicaragua and Costa Rica does not explicitly mention regulation. But it says all it needs to say to fully endow Nicaragua with the power to regulate navigation on the San Juan River, when it provides Nicaragua *exclusively* with dominion and "sumo imperio", *summum imperium*, over the river. By this language, Nicaragua alone is empowered to exercise the functions of a State with regard to the river. Those functions necessarily include the exercise of her police power to regulate activities on the river, including navigation, to ensure safety on the river, to prevent criminal trafficking in drugs or weapons, to prevent illegal immigration, and of course to protect the natural environment and prevent pollution of the river and adjacent shore area. The instruments, resolutions, and rules I have just discussed demonstrate that there is nothing inconsistent in recognizing a State's authority to regulate navigation in her sovereign waters — even in cases, unlike this one, involving international rivers that flow through the sovereign territory of more than one State — and the right of other States to enjoy freedom of navigation in the same waters. The inconsistency only arises if the sovereign attempts to regulate navigation in an unreasonable, arbitrary or discriminatory manner, and thereby renders nugatory the right of free navigation enjoyed by neighbouring States. As I will now discuss, this is *not* the case with the regulations adopted by Nicaragua.

C. Nicaragua's regulations are reasonable and necessary to protect important State interests; they are neither arbitrary nor discriminatory

21. I come now to the third and final part of my presentation, in which I address the reasonableness of Nicaragua's regulations pertaining to the San Juan River. Nicaragua submits that her regulations are indeed reasonable, that they further legitimate and important national interests, and they are not arbitrary or discriminatory in any way. As such, they do not violate Costa Rica's navigation rights under the 1858 Treaty.

22. The evidence shows, the evidence shows, that the laws and regulations adopted by Nicaragua with regard to the San Juan River promote and protect the following interests: *first*, the preservation of the natural environment, including endangered animal and plant species, and the

prevention of pollution; *second*, the control and prevention of crime, especially the illegal poaching of animals and trees from protected forests and waters, and the interdiction of trafficking in drugs and arms; *third*, the promotion of navigational safety on a river that is notoriously difficult and at times extremely dangerous to navigate, especially after nightfall; *fourth*, the control of borders and immigration; and *fifth* the manifestation and preservation of Nicaragua's sovereignty over the river.

23. It cannot be disputed that all of these are legitimate and important national and, in some cases, international interests. They are also precisely the public interests that sovereign States are entitled to promote and protect by reasonable regulation of navigation in their sovereign waters, without transgressing the rights of free navigation afforded to other States. Article 6 of the Barcelona Statute and Article 45 of the Berlin Rules, from which I read earlier, for example, list these specific interests among those justifying a State's regulation of navigation even as those instruments provide the right of freedom of navigation.

24. In this case, Costa Rica challenges five particular exercises of Nicaragua's regulatory power. Nicaragua has already demonstrated in her written pleadings that all five of these exercises of her police power are reasonable, and that they are not arbitrary or discriminatory against Costa Rica. For this reason, I will only summarize this evidence, so that I may focus more on responding to the criticisms voiced by Costa Rica's representatives at these oral proceedings.

(a) *The requirement to stop and register*

25. *First*, Costa Rica challenges Nicaragua's requirement that all vessels stop and register at Nicaraguan border posts upon entering and exiting the San Juan River. This regulation applies to all vessels, including Nicaraguan vessels[17]. It requires boat operators to stop at the first Nicaraguan security post that they pass and identify themselves, their passengers and their cargoes. That is all. No fees or tolls are charged by Nicaragua for entering or exiting the river. Nicaragua promulgated this regulation in order to ensure that the river is used only for lawful purposes, and in particular to ensure that it is used in a manner consistent with environmental protection and preservation.

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[17] See Rejoinder of Nicaragua (RN), paras. 4.61, 4.71, 4.80.

26. In her written pleadings, Nicaragua presented extensive evidence, none of which has been disputed by Costa Rica, that the San Juan River itself, and the Nicaraguan shore adjacent to it, are extremely important and gravely threatened natural preserves[18]. Since 1990, when peace returned to the area, Nicaragua has dedicated herself to the protection of three extensive botanic and wildlife preserves on or adjacent to the San Juan: (1) the Indio Maíz Biological Reserve; (2) the San Juan River Wildlife Refuge; and (3) the San Juan River-Nicaragua Biosphere Reserve[19]. A sketch-map is included in your judges' folder, and projected on the screen in front of you and behind me is that map.

27. The Indio Maíz Biological Reserve was first created in 1990 and included the entire San Juan River. It now encompasses more than 3,000 sq km[20]. In 1999, the San Juan Wildlife Refuge, made up of the river itself and a 2 km strip along the Nicaraguan bank, was carved out of the Indio Maíz Reserve and constituted as a separate reserve[21]. The San Juan Wildlife Refuge has since been designated a wetland of international importance under the Ramsar Convention[22]. In 2003, Unesco's Man and the Biosphere Programme designated both the San Juan Wildlife Refuge and the Indio Maíz Biological Reserve as part of the greater international biosphere reserve known as the San Juan River-Nicaragua Biosphere Reserve which covers more than 18,000 sq km — or fully 14 per cent of Nicaragua's entire territory [23]. These areas are home to an impressive, and unfortunately in many cases, endangered, diversity of flora and fauna, as described in detail in Nicaragua's Rejoinder [24].

28. The evidence shows that Nicaragua has invested major resources in protecting these particular reserves. The Nicaraguan Ministry of Environment and Natural Resources has established four posts along the Nicaraguan bank of the river opposite Costa Rica, in addition to inland posts scattered throughout the Indio Maíz Reserve[25]. The distance between these posts can

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[18] See Counter-Memorial of Nicaragua (CMN), paras. 1.1.18-1.1.25; RN, pp. 179-197.

[19] See CMN, Vol. II, Anns. 59-61; RN, Vol. II, Anns. 39, 44-45.

[20] See RN, paras. 4.37-4.45; CMN, Vol. II, Ann. 59; RN, Vol. II, Ann. 47.

[21] See RN, para. 4.40; CMN, Vol. II, Ann. 60.

[22] See RN, para. 4.41; *ibid.* Vol. II, Ann. 44.

[23] See *ibid.*, paras. 4.44-4.45; *ibid.*, Vol. II, Ann. 39.

[24] See *ibid.*, paras. 4.39-4.43, 4.51-4.59.

[25] See *ibid.*, paras. 4.49-4.50.

be up to 40 km, which makes it extraordinarily difficult to monitor activities along the river or the adjacent shore area. The challenge is compounded by the fact that illegal loggers and poachers who operate in the area are often armed. As a result, the Environment Ministry and the Nicaraguan army have joined efforts to co-operate in the task of protecting the river[26].

29. The main threats to the flora and fauna of the river and its shore come from people, and most of the people who threaten the protected species come from the Costa Rican side. This is a proven fact, and it is not an accusation against Costa Rica or her people. The simple truth is that the people who violate the protected areas for illicit purposes can only come from the Costa Rican side because that is where people live. Nicaragua does not allow any settlements on her side of the river where the protected areas are, and it strictly limits and regulates even temporary entry into the reserves by any person[27]. Projected before you, and included in your judges' folder, is a sketch-map prepared by Costa Rica — not Nicaragua —, prepared by Costa Rica, and included in her Memorial, showing the location of the settlements on her bank of the river across, directly across, from Nicaragua's protected areas. As set forth in Nicaragua's Rejoinder, illegal logging, illegal hunting and fishing, and illegal poaching of rare and endangered animals in the river or on the adjacent shore by local residents of Costa Rica are serious, on-going problems that require constant vigilance[28]. My friend Professor Kohen told the Court on Tuesday that this simply cannot be true because, if it were, Nicaragua would have presented evidence of arrests or prosecutions of these persons, and she did not. "Not one case", Professor Kohen intoned with some emphasis[29]. In fact, Nicaragua did present this evidence, and we respectfully refer Professor Kohen, who must have overlooked it, and the Court, which we trust will not, to Annex 43 of Nicaragua's Rejoinder, which is the criminal complaint filed by Nicaragua's Public Prosecutor against 20 poachers "originating from the sister Republic of Costa Rica"[30].

30. There are no bridges across the river. The only way to get from the Costa Rican side to the Nicaraguan side is by navigating across the river. Similarly, because there are no roads on the

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[26] See *ibid.*, para. 4.50; *ibid.*, Vol. II, Ann. 3.

[27] See RN, para. 4.60.

[28] See RN, paras. 4.51-4.60.

[29] CR 2009/3, p. 42, para. 32.

[30] RN, Vol. II, Ann. 43.

Nicaraguan side, the only way to access the reserves from there is also by boat. By requiring all persons — Nicaraguans as well as Costa Ricans — who enter the river to stop and register, Nicaragua is able to monitor traffic, and to control access to the reserves, including the river itself, and thereby protect them[31]. By requiring vessel operators to register their boats and their passengers upon entering *and* exiting the river, Nicaragua can assure that all who enter the river also leave it, and that no one remains behind unlawfully in any of the densely forested protected areas, where he could easily fell trees or capture or kill rare animals without fear of detection.

31. Now unfortunately both Professors Kohen and Caflisch were rather sarcastic in describing what they called Nicaragua's "sudden" concern for the environment[32]. Professor Kohen called it a "last minute argument" that "suddenly appeared in the Rejoinder"[33]. In fact, Nicaragua cited environmental protection of the San Juan River and its environs as a major concern in her Counter-Memorial, at pages 14 through 16. And, as the evidence shows, Nicaragua has been continuously protecting the San Juan and the adjacent shore area as endangered natural preserves since at least 1990. While they complain that Nicaragua supplied extensive additional evidence in her Rejoinder, which she did, they offer nothing to undermine or refute that evidence; their main complaint is about its timing, even though they have now had an opportunity to study and respond to it for more than eight months. To dismiss such evidence on grounds of its supposed "suddenness" is a way to sweep away unfavourable facts when there is no other defence against them.

32. The requirement to stop and register also serves Nicaragua's interests in preventing criminal activity other than environmental crimes. Aside from illegal logging and poaching of animals, common criminal activities on the river include arms and drug trafficking. Having to stop and register upon entering and exiting the river has an obvious deterrent effect on these activities. The requirement is especially important given the geography of this river, which winds its way through 140 km of remote territory that is either heavily vegetated on the Nicaraguan side or intermittently populated on the Costa Rican side. Especially since Nicaragua's checkpoints are

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[31] See RN, para. 4.61.

[32] See CR 2009/3, p. 25, para. 10; p. 35, para. 4; p. 42, para. 35; p. 43, para. 37.

[33] CR 2009/3, p. 35, para. 4; p. 42, para. 35; p. 43, para. 37.

widely spread out, it is only by keeping track of vessels as they enter and leave the river that Nicaraguan authorities can effectively protect against unlawful activity.

33. Professor Caflisch cavalierly dismisses this justification for the regulation on the ground that "criminals do not turn up at Nicaraguan army posts prior to perpetrating crimes"[34]. But that is precisely the point. The requirement that all vessels stop and register at one of these posts upon entering the river discourages would-be criminals from turning up and having to register; were they to attempt to navigate past the post without stopping, they would be spotted, pursued and detained.

(b) *Departure clearance certificates*

34. *Second*, Costa Rica challenges the requirement to obtain a departure clearance certificate. This requirement serves Nicaragua's interest in assuring navigational safety on the San Juan River, as well as her interests in environmental protection and criminal law enforcement. The issuance of departure clearance certificates by riparian or coastal States is a common practice worldwide. Nicaragua is no exception. Neither is Costa Rica. In both States, as in many others, vessels must be inspected to ensure their seaworthiness, and their compliance with anti-pollution requirements. When vessels stop at Nicaraguan security posts to register their entry into the river, they are inspected by the authorities there to ensure that they are sufficiently seaworthy to safely navigate the river, and that they are free of fuel leaks that might pollute the waters. The inspection also ensures that no vessels are loaded with illegal cargo, such as protected plants or animals, including fish, illegally taken from Nicaragua's reserves, or drugs or firearms. These are legitimate public interests. And in fact, prior to filing this case Costa Rica expressly approved of Nicaragua's practice in this regard. This is reflected in the Final Minutes of a 1997 meeting of the Binational Nicaragua-Costa Rica Commission, located in your judges' folder and projected in front of you. These Minutes state:

> "Faced with the problem presented by the Costa Rican delegation regarding the existence of sites that require the presence of authorities with competency in the matter, it was agreed that Nicaragua will make efforts to establish posts at determined sites, so as to extend coverage in the fight against this crime . . .

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[34] CR 2009/3, p. 28, para. 19.

> **With respect to the movement of vessels, it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case the posts at San Juan del Norte, San Carlos and Sarapiquí."[35]**

Professor Caflisch attempts to dismiss this agreement on the ground that Costa Rica approved of Nicaragua's registration and departure clearance requirements only because she considered them necessary to prevent drug trafficking[36]. Guilty as charged. Even if he is correct, this still proves Nicaragua's point: that Costa Rica herself agreed that there was good reason for both the registration and departure clearance requirements imposed by Nicaragua, and that she approved of them on that basis.

35. Professor Caflisch and Professor Kohen complain about the small charge Nicaragua collects to cover her costs of inspection. Boat operators are charged US$5 for this service. The charge applies to all nationalities, including Nicaraguans[37]. There is an exception, however, for local Costa Rican residents who live on the right bank of the river. Strictly as a courtesy to these Costa Rican neighbours, Nicaragua regularly issues them departure clearance certificates free of charge[38].

36. The evidence before you does not support Costa Rica's claim that the departure clearance certification process infringes on her navigation rights under the 1858 Treaty. Costa Rica has introduced no evidence of any kind that any of her vessels has ever been arbitrarily denied a certificate, or has been prevented from navigating on the river on this basis. Nor has Costa Rica produced evidence that the payment of the $5 fee has discouraged navigation. It is difficult in any event to believe that such a minimal payment would have such an effect, and Costa Rica makes no such argument.

37. There is nothing in the Treaty of 1858 to prohibit Nicaragua from charging this small fee for the service of conducting the inspection. Article VI, in its Spanish original and only authoritative text, prohibits Nicaragua from requiring Costa Rica to pay "impuestos", in English, "imposts", or duties, on the merchandise carried by Costa Rican commercial vessels. The minimal fee charged by Nicaragua is not, by any definition, an "impost". It is a fee for service, in French a

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[35] RN, Vol. II, Ann. 4.

[36] See CR 2009/3, p. 29, para. 22.

[37] RN, paras. 4.62-4.63; 4.72; 4.81; RN, Vol. II, Ann. 48, Ann. 70, p. 436, and Ann. 77, p. 487.

[38] RN, paras. 4.74, 4.88, 5.110; RN, Vol. II, Anns. 70, 72, 73, 77, 78.

"redevance", not a tax. As such it is not prohibited by the Treaty. The instruments I discussed earlier, including the Barcelona Statute, among others, draw a clear distinction between customs and other taxes on the one hand and fees for services on the other. Fees for services are considered lawful exercises of a sovereign State's police powers, even when customs and other taxes are prohibited. Moreover, even with regard to imposts, Article VI provides that they shall not be collected "unless when levied by mutual consent of both Governments". Such consent has been given numerous times since 1858, in tax and customs treaties between the two States, and in regional treaties, including the Central American Uniform Customs Code[39]. Professor Caflisch impugns Nicaragua's motives. He says "the objective of these [departure clearance] certificates is not one of promoting safety but one of levying a tax"[40]. He is, of course, entitled to his opinions. But this one is contradicted by all the evidence.

38. Professor Kohen claims that Nicaragua has violated her obligation under Article VI, which is also an obligation of Costa Rica, to permit the vessels of both countries "to land indiscriminately on either side of the river, at the portion thereof where the navigation is common"[41]. The landing right that is provided is for Costa Rican vessels engaged in navigation under Article VI, that is, navigation "con objetos de comercio". The only place on the Nicaraguan side where commerce can be conducted is San Juan del Norte, because it is the only Nicaraguan settlement, and Costa Rican vessels have always been and remain free to land there. There is no evidence that they have ever been prevented from landing, and Professor Kohen cites none. Two additional points could be made in response to Professor Kohen, although no more is required. Under Article VI, indiscriminate landing rights are linked to the absence of imposts. But imposts are no longer absent, by mutual agreement. Under current arrangements, landing is permitted by both States only where there are customs or border posts. If it were otherwise, smugglers could invoke indiscriminate landing rights to avoid payment of duties by landing where there are no customs or border facilities. And, in fact, neither Costa Rica nor Nicaragua really understands Article VI to require indiscriminate landing rights for the other's nationals. As I will discuss in my

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[39] Central American Uniform Customs Code [Código Aduanero Uniforme Centroamericano (CAUCA)], 13 Dec. 1963. Published in *La Gaceta* of Nicaragua No. 339, 18 Feb. 1966.

[40] CR 2009/3, p. 29, para. 23.

[41] Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 Apr. 1858, Art. VI. MCR, Vol. II, Ann. 7 *(c)*.

next speech, Costa Rica does not allow Nicaraguan boats to land indiscriminately on her bank; instead, she arrests the passengers as illegal aliens.

(c) *The prohibition on navigation after nightfall*

39. *Third*, Costa Rica challenges Nicaragua's prohibition of navigation on the river after nightfall. Nicaragua makes exceptions, of course, for cases of medical and other emergency. The most important reason for this regulation is navigational safety. The evidence shows that it is not safe to navigate on this river after dark. Very few of the boats that transit the river have even the most rudimentary navigation lights[42]. Not only can they not see the water in front of them, but other boats cannot see them, risking collision. Nocturnal navigation is particularly dangerous in parts of the river where the waters are shallow, and boats frequently run aground on the numerous sand bars that are invisible at night. The wide range of hazards includes rapids, many fallen trees and yes, even crocodiles[43]. None of this evidence is disputed by Costa Rica. Professor Caflisch, who apparently has never been to the river — as Nicaragua's counsel have — tells us that Nicaragua can promote the legitimate objective of navigational safety by requiring "that boats travelling at night shall carry lights"[44]. As the distinguished Agent of Nicaragua pointed out yesterday, such a proposal could only be made by someone, well intentioned, but unfamiliar with both the river and the extreme poverty that characterizes most of the local population. We say that, as the sovereign, it is up to Nicaragua in any event to determine what safety measures are required, limited only by the obligation to assure that they are reasonable and not applied against Costa Rica in an arbitrary or discriminatory manner. The prohibition on night-time navigation, given the nature of this particular river and the specific hazards that are present, meets this test.

40. The prohibition is applied to all navigation after dark, including Nicaraguan navigation[45]. Professor Caflisch attempts to show that Nicaragua employs a double standard, allowing night-time navigation for her own vessels but not those of Costa Rica[46]. To support this charge he cites a

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[42] RN, paras. 4.80, 4.83-4.85.

[43] *Ibid.*

[44] CR 2009/3, p. 32, para. 26 (v).

[45] RN, para. 4.65.

[46] CR 2009/3, p. 31, para. 26 (iv).

timetable for a Nicaraguan ferry service that travels between, in his words, "Grenada and San Carlos overnight"[47]. I am afraid Professor Caflisch's geography is a bit off. As shown in the map on the screen in front of you and in your judges' folder, ferry transport between Grenada and San Carlos traverses Lake Nicaragua, not the San Juan River.

(d) *Border and immigration requirements*

41. *Fourth*, Costa Rica challenges the requirement that foreign nationals who enter the river, and thereby enter Nicaraguan territory, pass through Nicaraguan immigration facilities and the same procedures that are followed at all other entry points into Nicaragua. Just as all non-nationals are required to obtain a tourist card when entering Nicaragua at the Managua International Airport or at other points of entry, so too when they enter Nicaragua via the San Juan. Depending on the traveller's country of origin, entry into Nicaragua may also require a valid visa. Surely Costa Rica's right to navigate freely on the river "con objetos de comercio" does not mean she is free to bring undocumented aliens into Nicaraguan territory at her pleasure.

42. In practice, the visa requirement affects very few of the tourists who enter Nicaragua on Costa Rican tour boats. The undisputed facts, compiled from Nicaragua's immigration records, show that *almost all of the tourists* on these boats are from the United States of America, Canada, the European Union or Australia, none of whom are required to have visas to enter Nicaragua[48]. The evidence also shows that, as a courtesy extended by Nicaragua, local Costa Rican residents and operators of Costa Rican commercial vessels are permitted to transit the river without tourist cards or visas[49].

43. The Court needs no reminding that visa and tourist card requirements are common throughout the world, as a means by which States exercise their inherent right to regulate the entry of foreign nationals into their territory and protect their borders. Costa Rica complains about the fees associated with these requirements. This is a difficult argument for Costa Rica to sustain, in light of the near universal practice of States to charge foreign nationals for the issuance of visas and tourist cards. Nicaragua charges Costa Rican nationals, other than local riparians, $20 for a visa,

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[47] *Ibid*, footnote 91.

[48] RN, paras. 4.33, 4.90; RN, Vol. II, Ann. 71.

[49] RN, para. 4.88-4.89; RN, Vol. II, Anns. 70, 73, and 78.

about the same amount that Costa Rica charges Nicaraguans who apply for a Costa Rican visa. The charge for a tourist card is $5. Immigration processing, including both entry and exit, amounts to $4. Has Costa Rica really brought her case to this great Court over the grand sum of $9 per tourist, which is no more than it costs to take a guided tour of the Peace Palace? If so, the evidence is against her. Costa Rica has not produced evidence of a single case of a tourist who was discouraged from travelling to the San Juan by the cost of Nicaragua's tourist card and immigration processing. These are not, to quote Professor Kohen, "transit charges" for using the river to navigate between points in Costa Rica, although his characterization is quite revealing of an underlying difference between the Parties[50]. What Professor Kohen, and more importantly, Costa Rica, ignore, or refuse to accept, is that the river is part of Nicaragua's sovereign territory. To enter it is to enter Nicaragua. Nicaragua has the right to apply her non-burdensome immigration regulations.

44. It is worth emphasizing that there is no evidence to support Costa Rica's claim that any of Nicaragua's regulations, including her immigration requirements, impose a burden on her tourist industry sufficient to cause a decline in tourist traffic[51]. Nowhere has Costa Rica produced any actual data, as opposed to conjecture, to support her assertion. The only hard evidence before the Court comes instead from Nicaragua's immigration records, and it shows the opposite of what Costa Rica contends. In particular, the evidence demonstrates that between 1998 — which is the year Costa Rica says Nicaragua began violating her rights in a systematic way — and 2004, the last full year before these proceedings were commenced, the number of tourists travelling per year on the San Juan in Costa Rican tour vessels grew from 711 in 1998 to 2,590 in 2004[52]. Nicaragua respectfully submits that it is impossible to base on these figures an argument that her regulations have adversely affected Costa Rica's tourism excursions on the San Juan, even if that kind of navigation could rightly be included in the definition of navigation "con objetos de comercio".

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[50] CR 2009/3, p. 37, para. 17.

[51] See Reply of Costa Rica (RCR), para. 4.12 (iii).

[52] See RN, para. 4.33, table 1; RN, Vol. II, Ann. 71.

(e) *The requirement to fly the Nicaraguan flag*

45. *Fifth and finally*, Costa Rica complains about the requirement that larger boats fly the Nicaraguan flag while navigating the San Juan. This too is an appropriate and non-burdensome incident of Nicaragua's exclusive *summum imperium* over the river. The requirement only applies to those vessels that have masts or turrets at the stern, a distinction which renders the regulation inapplicable to the vast majority of Costa Rican boats that use the river, which are almost all small wooden "pangas", or simple boats with a small outboard motor, which have no means to display flags[53].

46. The expectation that larger vessels will fly her flag while navigating on her waters, in a minimal gesture of respect for Nicaragua's sovereignty, is a matter of international practice, at least in the territorial sea[54]. Nicaragua sees no reason it may not require *a fortiori* the same courtesy on her sovereign internal waters, especially as Nicaragua permits Costa Rican vessels to continue flying the Costa Rican flag alongside Nicaragua's[55]. Professor Caflisch, though he objects to the regulation, admits that "there may also be a practice, inspired by *international courtesy*, to show the flag of the country whose waters are being navigated in"[56]. For Nicaragua, as the sovereign over these waters, she has a right to insist on this courtesy. In terms of the evidence before you, Costa Rica has not identified a *single incident* in which Nicaraguan authorities have prevented a Costa Rican vessel from navigating on the San Juan because of a failure or refusal to display the Nicaraguan flag. There is no serious argument that this regulation has done anything to impede Costa Rican navigation on the San Juan River.

47. Mr. President, Members of the Court, I have now addressed each of the five sovereign exercises of Nicaragua's police power that Costa Rica finds objectionable. I respectfully submit that the Treaty of 1858 empowers Nicaragua to regulate navigation on the San Juan River, provided she does so reasonably, and the evidence demonstrates, indeed it leaves no doubt of the reasonableness of her exercise of this right, as well as the absence of any violation of Costa Rica's right to enjoy free navigation "con objetos de comercio".

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[53] See RN, para. 4.92.

[54] See CMN, para. 5.3.3; RN, para. 4.93.

[55] See RN, para. 4.93; RN, Ann. 77, p. 488.

[56] CR 2009/3, p. 33, para. 30.

48. Before concluding my presentation, I would like to say a very few words about fishing. Nicaragua stands by her written pleadings, which explain why Costa Rica's fishing claim is inadmissible[57]. Having said this, however, there is no reason why fishing should be a matter of contention between the Parties here. Nicaragua does not prohibit subsistence fishing by local Costa Rican residents[58]. While Nicaragua does not agree that there is a customary right to fish in her territorial waters, she has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities. Only non-subsistence fishing, such as commercial and sport fishing in the protected waters of the San Juan River Wildlife Refuge, is prohibited[59]. In practice, subsistence fishing on this particular river of not too great width is conducted from the Costa Rican shore, and without interference by Nicaragua. Commercial fishing, by contrast, is generally conducted from boats in the middle of the river, casting wide nets that trap large quantities of fish, crustaceans and marine mammals. Nicaragua does not understand Costa Rica to claim a customary right, or any other right, for her nationals to engage in commercial fishing.

49. Mr. President, Members of the Court, this brings me to the end of my presentation. I thank you for your patience and kind attention, and I ask that you now call on Professor McCaffrey. Thank you very much.

The PRESIDENT: I thank Mr. Reichler for his presentation. I now invite Professor Stephen McCaffrey to take the floor.

Mr. McCAFFREY:

1. Mr. President, Members of the Court, it is an honour to appear before you today on behalf of the Republic of Nicaragua, and a great privilege to appear before this distinguished Court again.

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[57] See CMN, pp. 197-204; RN, paras. 4.67-4.68.

[58] See CMN, 5.1.6, 5.1.15; RN, para. 4.67; RN, Vol. II, Anns. 67, 72, 73.

[59] See RN, para. 4.67; RN, Vol. II, Ann. 73.

COSTA RICA'S NAVIGATION ON THE SAN JUAN RIVER WITH PUBLIC VESSELS: THE TREATY OF LIMITS AND THE CLEVELAND AWARD

Introduction

2. Mr. President, my task this morning is to address the question of navigation by Costa Rica with public vessels, other than those of the revenue service, under the 1858 Treaty of Limits and the 1888 arbitral award rendered by President Grover Cleveland. I will show that neither the Treaty nor the arbitral award provides any foundation whatsoever for Costa Rica's alleged right to navigate on the San Juan with her public vessels for almost unlimited purposes, including to resupply her border posts, to exchange personnel at those posts with their official equipment, including service arms and ammunition, for "purposes of protection" as Costa Rica understands that expression, and to discharge a number of other public functions.

3. In showing that Costa Rica has no such rights of navigation with public vessels on the San Juan, I will cover three points: *first*, Costa Rican public vessels have no right of navigation on the San Juan under Article VI of the 1858 Treaty; *second*, the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels; and *third*, Costa Rica's very narrow right of protection under the Cleveland Award and her obligations of defence under Article IV of the Treaty of Limits provide no support for her alleged rights to navigate with armed or other public vessels.

I. COSTA RICAN PUBLIC VESSELS HAVE NO RIGHT OF NAVIGATION ON THE SAN JUAN UNDER ARTICLE VI OF THE 1858 TREATY

4. Mr. President, beginning with my first point, contrary to the sweeping contentions of Costa Rica, her public vessels enjoy no right of navigation on the San Juan River under Article VI of the 1858 Treaty itself. That Article simply does not mention any right of Costa Rica to navigate on the river with public vessels. Of course, President Cleveland interpreted the Treaty to permit restricted navigation by Costa Rican *revenue* vessels. But unless Costa Rica's public vessels navigate "con objetos de comercio", which would be highly unusual, however that expression is translated, Article VI gives them no right to operate on the San Juan.

5. And indeed, this is a point that Costa Rica seems determined to overlook. Time and again in these hearings, counsel for Costa Rica have stated that under Article VI, Costa Rica enjoys a

"perpetual right of free navigation" — full stop[60]. By thus decoupling this phrase from the rest of the Article, Costa Rica makes the "perpetual right of free navigation" a free-standing right. Obviously, this wrenching of the phrase from its textual context does great violence to the meaning of the Article. If counsel had read on, they would have found that the Costa Rica's "perpetual rights . . . of free navigation" apply only to navigation "for the purposes of commerce", or navigation "con objetos de comercio". Thus, putting the relevant elements of the phrase together, the English translation submitted to President Cleveland reads: "the Republic of Costa Rica shall have perpetual rights . . . of free navigation . . . for the purposes of commerce". These so-called perpetual rights thus apply only to navigation "con objetos de comercio".

6. And incidentally, Mr. President, the Parties could not in fact have envisaged that Costa Rica's rights of navigation would necessarily be "perpetual". They were well aware of the interest at the time in an interoceanic canal making use of the San Juan River, and both the 1858 Treaty (in Articles VII and VIII) and the Cleveland Award (in paragraphs 10 and 11 of its *Third* Article) contemplate such a canal. Moreover, Costa Rica did not object to any of the transit concessions and canal contracts signed by Nicaragua prior to 1858[61]. So, while Costa Rica might be entitled to compensation for any injury to her "natural rights", her perpetual right of free navigation would effectively cease with the conversion of the river into a canal.

7. On Tuesday, counsel for Costa Rica made the novel argument, apparently for the first time, that: "Under Article VI Costa Rican public vessels enjoy the same right of navigation for purposes of commerce as Costa Rican private vessels — there is no relevant distinction based on ownership of the vessel."[62] He combined this surprising idea — which flies in the face not only of reason but also of the background and context of the 1858 Treaty — with one that Costa Rica invented in its written pleadings and has repeated here before the Court — namely, that "commerce" is really "communication". And by "communication" Costa Rica does not limit herself to the exchange of information by post, or even telephone or the Internet. Instead, as she does with "commerce," she redefines "communication" — in this case, to mean the sum total of all

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[60] E.g., CR 2009/02, p. 22; CR 2009/03, pp. 8, 12, 22, 23 (twice), 26, 31, 32, 33, 34, 44, 50, 51.

[61] See especially CMN, Chap. 1, Sects. 1.2.31-34 and 1.3.

[62] CR 2009/3, p. 8 (Crawford).

kinds of contacts by boat between one point and another. By doing so, she renders even her translation of "con objetos de comercio" — for purposes of commerce — completely meaningless. The effect of Costa Rica's interpretation of Article VI, then, is to excise the expression "con objetos de comercio" from the Article, and to permit all kinds of public vessels — presumably except for warships — to navigate on the San Juan for any purpose whatsoever. When the absurdity of this result is combined with Nicaragua's "exclusive dominion and supreme control" of the San Juan, it is obvious that the Court should reject Costa Rica's contention that her public vessels enjoy the same right of navigation "con objetos de comercio" as her private vessels.

II. COSTA RICA'S RIGHT OF NAVIGATION WITH PUBLIC VESSELS UNDER THE CLEVELAND AWARD

8. Mr. President, I turn to my *second* point. Perhaps sensing that an argument based on Article VI alone does not hold water, counsel for Costa Rica attempts to find support for broad rights of navigation by public vessels in the Cleveland Award[63]. According to this argument, made on Tuesday, President Cleveland did not address navigation by any kind of Costa Rican public vessel other than warships and revenue vessels; therefore, navigation by other kinds of public vessels is permitted. The most obvious problem with this argument is that President Cleveland was interpreting the 1858 Treaty, which only permits navigation on the San Juan by Costa Rica "con objetos de comercio". His award cannot be construed to create rights that are greater than those established by the Treaty he was interpreting.

9. What is inconvenient for Costa Rica is that rights of navigation "con objetos de comercio" — or even "for purposes of commerce" — are virtually never exercised by public vessels, either today or in the mid-nineteenth century. Perhaps realizing this, Costa Rica then adds: "This was recognized by the Second Article of the Cleveland Award . . ."[64] The Court will, of course, by now be well aware that the Second Article of the Cleveland Award, which we have practically examined under a microscope, says nothing at all about free navigation on the San Juan with public vessels. Moreover, by restricting the types of public vessels that *could* navigate on the San Juan to vessels of the revenue service, and by further restricting navigation by those craft to

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[63] CR 2009/3, p. 10 (Crawford).

[64] *Ibid.*

that which was "related to and connected with" navigation "con objetos de comercio" or that was necessary to the protection thereof, President Cleveland rejected Costa Rica's request that it be allowed to navigate with public vessels "to carry orders to the authorities of the bordering districts"[65]. Yet Costa Rica is before the Court today making virtually the same request.

10. Mr. President, as we have just seen, the 1858 Treaty itself said nothing about a right of Costa Rica to navigate on the river with any kind of public ship, including vessels of the revenue service.

11. But as the Court is aware, in his award of 1888, President Cleveland ruled on the question whether Costa Rica has a right to navigate on the San Juan with its warships or other public vessels. He said Costa Rica did not have a right to navigate on the San Juan with warships but that she did have a right, one which he carefully circumscribed, to navigate on the river with vessels of the revenue service. Some background on this latter right will help place it in its proper context.

12. As Nicaragua has noted in her written pleadings[66], in 1886 Costa Rica had in fact navigated on the San Juan with a national steamship carrying Costa Rican armed forces. According to a decree issued by the Government of Costa Rica in March of that year, one of the tasks of the steamship was to conduct reconnaissance at least once a week of the entire extent of the San Juan that was navigable by Costa Rica. The Nicaraguan Foreign Minister understandably characterized this as "an outright violation of Nicaragua's sovereign rights"[67], since nothing in the 1858 Treaty permitted it. But Costa Rica obviously had great difficulty accepting the limited navigational rights in Nicaragua's sovereign waters accorded her in the 1858 Treaty. She therefore followed a strategy she has pursued ever since the 1858 Treaty was concluded — namely, to try to create new rights to navigate on the San Juan River (graphic SMcC-1).

13. Thus in her pleadings before President Cleveland, Costa Rica quoted Article VI of the Treaty then posed the following rhetorical question regarding that provision, already referred to by my colleague Professor Pellet and shown on the screen:

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[65] Argument of Costa Rica, p. 155, RN, Vol. II, Ann. 5, at p. 30.

[66] CMN, p. 113, para. 3.1.32, *et seq.*

[67] *Ibid.*, p. 116, para. 3.1.37.

> "Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?"[68]

14. This question indicates that in 1888 Costa Rica presumed that she had the same navigational rights she claims today: broad rights to navigate with public vessels "for any . . . purpose not exactly within the meaning of transportation of merchandise". And as Professor Pellet pointed out, by the way, Costa Rica in this passage betrayed her understanding of the critical expression, "objetos de comercio", as meaning "merchandise". In case there is any doubt about how Costa Rica conceived of her navigational rights, she added: "It seems to be beyond discussion that Costa Rica can navigate in the San Juan with public vessels, which are not properly men-of-war."[69]

15. Mr. President, President Cleveland was quite clear in answering Costa Rica's question regarding a right to navigate with public vessels for a wide variety of purposes. The answer he gave was "no" — subject only to one narrow exception (graphic SMcC-2).

16. In the *Second* Article of his Award, President Cleveland stated that Costa Rica:

> "has *not* the right of navigation of the river San Juan with vessels of war; but she may navigate said river with *such* vessels of the revenue service *as may be related to and connected with* her enjoyment of the 'purposes of commerce' [those are President Cleveland's quotes around "purposes of commerce"] accorded to her in said article, or as may be *necessary to the protection* of said enjoyment"[70].

17. Thus President Cleveland rejected Costa Rica's argument that she should have broad rights to navigate the San Juan with public vessels for the purposes her question indicates. He said explicitly that she did *not* have a right to navigate on the river with warships. By expressly confining Costa Rica's right to navigate on the San Juan with public ships to those *revenue* vessels that were "related to and connected with" navigation "con objetos de comercio" or "necessary to the protection" of such navigation, President Cleveland *excluded* a right in Costa Rica to navigate not only with other kinds of public vessel, but also with revenue vessels that were performing any function other than the ones he specified. Yet Costa Rica now claims a right to navigate on

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[68] Argument of Costa Rica, p. 155; RN, Vol. II, Ann. 5, p. 30.

[69] *Ibid.*, p. 156.

[70] MCR, Vol. II, Ann. 16, p. 98; emphasis added.

Nicaragua's sovereign waters with armed and other public vessels that have *nothing* whatsoever to do with customs enforcement or protection of trade.

18. Mr. President, the *travaux préparatoires* of President Cleveland's Award are helpful in understanding why he would have felt it necessary to prohibit navigation of most kinds of Costa Rican public vessels and to impose so many conditions on the one kind — revenue vessels — he did permit.

19. As discussed in Nicaragua's Counter-Memorial[71], President Cleveland asked Assistant Secretary of State George L. Rives to prepare draft recommendations for the arbitral award. On the question whether Costa Rican warships or other public vessels should be permitted to navigate on the San Juan, Mr. Rives took an approach similar to that advocated by Costa Rica in the arbitration: namely, to assimilate Costa Rica's right to navigate with public vessels on the San Juan to the right of public vessels of one State to navigate in the territorial sea of another State. Rives found that coastal States "impose no restriction upon the friendly visit of foreign men-of-war in time of peace . . ."[72]. He therefore recommended that President Cleveland answer the second question put to him, regarding the right of Costa Rica to navigate on the San Juan with vessels of war or of the revenue service, in the following way:

> "[V]essels of war and of the revenue service belonging to Costa Rica have the same privilege[s] of navigating the river San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, — but no other, or greater privileges."[73]

20. Mr. Rives thus recommended that the Award recognize rather broad rights of navigation by Costa Rican public vessels on the San Juan — rights similar to those claimed by Costa Rica in the Cleveland arbitration, and not dissimilar to the ones she claims today. President Cleveland, however, rejected Rives's recommendation entirely (graphic SMcC-3).

21. So thoroughgoing was his disagreement with Rives that President Cleveland, in his own hand, struck out Rives's entire recommended answer and substituted his own, much more restrictive ruling as can be seen on the screen[74]. That is paragraph, or Article *Second* of his Award.

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[71] CMN, pp. 120 *et seq.*, paras. 3.1.46 *et seq.*

[72] *Ibid.*, Ann. 71.

[73] *Ibid.*

[74] CMN, Vol. 2, Ann. 72, pp. 258-259.

Insight into why President Cleveland may have done this is provided by his repeated references to the 1858 Treaty in the *Second* Article of his Award. He doubtless had in mind that the Treaty effected a territorial settlement in which Nicaragua ceded to Costa Rica the large district of Nicoya in return for full sovereignty over the San Juan River. A waterway that, in so far as Costa Rica's navigational rights are concerned, is obviously *not* an international river as contended by Costa Rica most recently in these hearings. President Cleveland's determination to cause the least possible impairment of Nicaragua's sovereignty is clear from his sharp curtailment of the navigational rights proposed by Rives for Costa Rica. Thus for each of the two kinds of vessels mentioned in the second question put to him, President Cleveland gave a markedly different answer than had been recommended by Rives: where Rives would have permitted navigation by Costa Rican warships, President Cleveland found no right at all to engage in such navigation; where Rives would have similarly permitted unrestricted navigation by Costa Rican revenue vessels, President Cleveland *strictly* limited Costa Rica's right to navigate with them.

22. It is further revealing to note what President Cleveland did not do. First, having prohibited Costa Rican warships, he could have allowed navigation by police and lesser military vessels on the river. He did not. And second, having responded in the negative concerning vessels of war, President Cleveland could then have simply responded in the affirmative, in general terms, as to vessels of the revenue service. But this he also did not do. Instead, President Cleveland permitted navigation on the San Juan by such Costa Rican vessels only when they were serving a very specific purpose — namely, only when their navigation is "related to and connected with her enjoyment of 'the purposes of commerce' . . . or as may be necessary to the protection of said enjoyment". Thus, President Cleveland did not even recognize a right in Costa Rica to navigate on the San Juan with any and all revenue vessels, whatever the purpose of their voyage. Rather he took pains to confine Costa Rica's right to navigate with such vessels quite narrowly and specifically, adding restrictions that had not been recommended by Mr. Rives.

23. Clearly, President Cleveland did not wish to negate his own ruling that Costa Rica did not have the right to navigate on the San Juan with warships. Indeed, as acknowledged by

Costa Rica on Tuesday[75], Nicaragua had argued in her Reply in the arbitration: "Vessels of the revenue service are akin to vessels of war. . . . [T]hey are armed vessels, capable of enforcing their demands by force . . ."[76] This assessment was echoed by George Rives in his report to President Cleveland[77]. That the two kinds of vessels may be indistinguishable is especially the case on a relatively small river like the San Juan, on which an armed public vessel takes on even greater proportions.

24. Because it was actually argued in the arbitration and recognized by Rives, this feature of revenue vessels could not have been lost on President Cleveland — and Costa Rica gave us touching additional evidence of this on Tuesday, in the form of President Cleveland's courtesies to Miss Folsom[78]. But how to prevent, or at least contain, a metamorphosis from cutter to warship? President Cleveland's solution was to place clear restrictions on what Costa Rican revenue vessels could do. They could only navigate on the San Juan in so far as they were "related to *and* connected with" navigation "con objetos de comercio" or were necessary to the protection of such navigation. This formula all but requires a physical connection between Costa Rican revenue vessels and her boats carrying "objetos de comercio". Certainly, without navigation "con objetos de comercio" there is no right of navigation by Costa Rican revenue vessels — and it bears emphasis that these are the only kinds of public vessels that Costa Rica is permitted to operate on the river.

25. In light of this history it seems safe to say that President Cleveland would have been quite surprised to learn that Costa Rica is now claiming sweeping rights to navigate on the San Juan with public vessels, including navigation to re-supply her border posts, and to exchange personnel at those posts with their official equipment, including service arms and ammunition.

26. Mr. President, as I recalled earlier, on Tuesday Costa Rica's counsel argued that all that was before President Cleveland was the permissibility of navigation by Costa Rican warships and

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[75] CR 2009/3, p. 13 (Crawford).

[76] CMN, Ann. 69. Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49. See discussion in CMN, paras. 4.2.14-15.

[77] Rives Report (Second), CMN, Ann. 70, p. 4.

[78] CR 2009/3 p. 13, para. 23 (Crawford).

revenue vessels[79]. But this argument ignores the pleadings in the case I have just discussed. Clearly, Costa Rica placed the issue of broad rights of navigation by public vessels before the arbitrator, and, just as clearly, President Cleveland rejected the idea of such rights.

Mr. President, this would be a convenient time for me to break my presentation if you wish to pause for coffee? Otherwise, I could go on?

The PRESIDENT: Thank you, Professor McCaffrey. I think that if your presentation is not going to be too long, you had better continue. Thank you.

Mr. McCAFFREY: I should continue? Fine, thank you, Mr. President.

III. COSTA RICA'S RIGHT OF PROTECTION UNDER ARTICLE VI AND HER ALLEGED RIGHT TO DEFEND THE RIVER UNDER ARTICLE IV

27. This then brings me to my *third* point, which is that neither Article VI of the 1858 Treaty as interpreted by President Cleveland nor Article IV of that agreement has anything at all to do with rights of protection and defence as now claimed by Costa Rica. In her submissions, Costa Rica requests the Court to find that Nicaragua has violated:

> "the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award . . ."[80].

28. By this submission, Costa Rica asks the Court to create out of whole cloth a right she tried unsuccessfully to obtain from President Cleveland in the nineteenth century.

29. The answer to Costa Rica's claim in this regard is a straightforward one. As has already been seen, President Cleveland carefully restricted what Costa Rican revenue vessels could do. Thus, the beginning and end of Costa Rica's right to protection is navigation with such vessels of the revenue service "as may be necessary to the protection of" navigation "con objetos de comercio"[81]. Yet Costa Rica claims a broad array of rights that are unrelated to, and unconnected with, her navigation "con objetos de comercio", effectively treating the San Juan as if the boundary

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[79] CR 2009/3, p. 9 (Crawford).

[80] RCR, p. 211, Submission 2 *(g)*.

[81] Cleveland Award, MCR, Ann. 16, p. 98; emphasis added.

followed the median line rather than the right bank, thus negating the *quid pro quo* reflected in the 1858 Treaty and, with it, Nicaragua's sovereignty over the river. However, Costa Rica has failed to rebut the detailed answers to her claims given in Nicaragua's Counter-Memorial and in her Rejoinder.

30. Chafing under the restrictions on navigation with public vessels in President Cleveland's interpretation of Article VI of the 1858 Treaty, Costa Rica seizes upon Article IV, conflating the obligation of defence under that Article with the restricted right of protection found by President Cleveland under Article VI. Article IV refers to the obligation of the two States to "unite in [the] defense" of the *bays* of San Juan del Norte and of Salinas, on the Atlantic, or Caribbean, and Pacific ends of the border between the two countries. However, Article IV says nothing about having to do this by boat. According to Article IV, this obligation is consequent upon, and closely tied to, the fact that the two bays, as Article IV puts it, "shall be common to both Republics . . .".

31. Costa Rica attempts to build on this slender reed an entire edifice of rights to navigate on the *river*. Indeed, she argued in the Cleveland arbitration itself that according to Article IV, she "must be permitted to maintain her vessels on the *San Juan* in order to guard and defend it with all the efficiency within her reach"[82]. President Cleveland did not accept this argument; Costa Rica nonetheless attempts to resurrect it in the present case.

32. The reason President Cleveland did not accept this argument is clear from the text of Article IV on its face. After granting Costa Rica the right to unite with Nicaragua in the defence of the bays in its first sentence, Article IV proceeds in its second sentence to provide for defence of the river. Except in this case, since the river is *not* "common to both Republics," Costa Rica must participate in its defence from her bank of the river, her land territory. Specifically, according to the second sentence of Article IV, Costa Rica is obligated with respect to "the portion belonging to her on the shores of the river San Juan" to "unite in its defense in [the] case of attack from without . . .". The text of this provision could not be clearer: Costa Rica has no right to unite in the defence of the river by boat; her obligation extends only to "the portion belonging to her on the shores of the river . . .".

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[82] Rives Report, CMN, Vol. II, Ann. 71, p. 253; emphasis added.

33. Mr. President, as discussed at length in Nicaragua's written pleadings, the second report of Assistant Secretary of State Rives confirms that Costa Rica may not "defend" or "protect" the river using public vessels. In that report, Mr. Rives, speaking of Article IV, pointed out:

> "All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency *within her reach* . . . [and he underlined 'within her reach'] Costa Rica would only be bound to contribute to the defence of the stream by land [he says], a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan."[83]

34. Indeed, Mr. President, the San Juan River, while not of course an unimportant stream, is hardly the Amazon, the Rhine, the Nile, or the Mississippi. Moreover, nothing in President Cleveland's Award disagrees with Rives's interpretation.

35. For the foregoing reasons Nicaragua respectfully urges the Court to reject Costa Rica's contention that Article IV of the 1858 Treaty has "implications for Costa Rica's navigation on the San Juan".

36. Mr. President, even though the Parties agree that the scope of Costa Rica's navigational rights with public vessels is to be determined by reference to the 1858 Treaty of Limits and the 1888 arbitral award[84], Costa Rica invokes four other agreements and communiqués[85] that she characterizes as part of the "applicable law"[86]. As Nicaragua has shown, both in her Counter-Memorial[87] and in her Rejoinder[88], these instruments are not helpful to Costa Rica's case. In both her written and oral pleadings, Costa Rica — unaccountably — seems to place most store in the so-called Cuadra-Lizano Joint Communiqué of 30 July 1998 — despite the fact that this failed arrangement in fact destroys her case. Costa Rica mistakenly characterizes the communiqué as a "conventional rule[]"[89]. But however it is characterized, the reason this communiqué is so harmful to Costa Rica's case is that it shows that Costa Rica recognizes that she requires the permission of Nicaragua to navigate on the river with public, armed vessels to resupply her border

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[83] CMN, Vol. II, Ann. 71, p. 251; emphasis in original.

[84] See, e.g., RCR, para. 1.18.

[85] RCR, para. 3.81.

[86] These documents are discussed in CMN, paras. 3.2.1-3.2.14.

[87] See *ibid.*

[88] See RN, Chap. II, Sec. II, and paras. 5.94-5.99.

[89] RCR, para. 3.81.

posts. Specifically, the communiqué would have provided that in order to navigate on the San Juan River with public vessels for the purpose of bringing supplies and relief staff to her police posts along the river, Costa Rica's Guardia Civil would have to obtain Nicaragua's *permission* in each case — in each case — *and* that this permission was subject always to three important conditions: first, that requests for authorization would be made prior to each voyage; second, that Nicaraguan authorities could accompany the Costa Rican vessels if Nicaragua wished; and third, that the Guardia Civil vessels would stop and report at all Nicaraguan army posts en route.

37. Counsel for Costa Rica stated on Monday that this text establishes a perfectly acceptable balance between the interests of the two Parties[90]. This may well be so, but it certainly does not support the general right for which Costa Rica argues. On the contrary, the text shows that Costa Rica's so-called "right" to engage in this navigation is entirely dependent on Nicaragua's authorization on a case-by-case basis. More importantly, the very fact that Costa Rica felt she had to obtain Nicaragua's agreement on the establishment of these procedures in the communiqué, and her disappointment that they were not implemented, demonstrates beyond doubt that Costa Rica did not have — nor did she herself believe she had — a general right to navigate on the river with public vessels to bring supplies and relief staff to police posts along the river. In any event, as Nicaragua has pointed out and as noted by Costa Rica on Monday, this communiqué was never implemented.

38. Costa Rica then returns to the actual applicable law, citing four reasons for finding "a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms"[91]. Her first reason is that "the re-supply of [border] posts is covered by the right of free navigation for purposes of commerce in Article VI of the 1858 Treaty"[92]. I have already shown that an interpretation of Article VI allowing an unrestricted right to navigate with public vessels carrying armed police would render that provision meaningless, wiping out all of President Cleveland's careful restrictions upon *even* Costa Rican revenue vessels.

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[90] CR 2009/2, p. 42, para. 39 (Caflisch).

[91] RCR, para. 3.86.

[92] *Ibid.*

39. Again in these hearings Costa Rica brings up the case of the ill-fated voyage of the *Adela* in an attempt to show that her alleged right to navigate on the lower part of the San Juan with public vessels carrying arms is supported by subsequent practice[93]. As Nicaragua has pointed out in her written pleadings[94], this incident actually proves the contrary. If the Costa Rican officer believed he had the right to navigate on the lower San Juan with arms, why did he feel the need to — and I quote his report — "hide in Costa Rican territory the arms and ammunitions that I carried"[95] before requesting permission to proceed? This inconvenient but crucial fact is ignored by Costa Rica. What the incident proves is not at all that Costa Rica had a right to navigate on the lower San Juan with arms, but rather, simply, that Costa Rica breached her obligation not to navigate there with armed public vessels unrelated to navigation "con objetos de comercio", and *knew* she had breached it.

40. Costa Rica's second reason for finding a right of navigation on the San Juan for her public vessels carrying armed officers is that "navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats"[96]. But the only kind of navigation permitted by Article VI is navigation "con objetos de comercio". Even if Costa Rica were using the San Juan to transport merchandise — which she is not[97] — the only kind of vessel she is permitted to use to protect navigation "con objetos de comercio" under the *Second* Article of the Cleveland Award is a vessel of the revenue service. And even these vessels may only be used to the extent they are "necessary to the protection of" such navigation. It is obvious that Costa Rica cannot show this if she is not navigating "con objetos de comercio". Even if she were, a showing of necessity would be required, in light of President Cleveland's *Second* Article. Except for the restricted right of navigation by Costa Rican revenue vessels, tied to navigation "con objetos de comercio", it is thus Nicaragua that has both the right and the responsibility to provide police protection of navigation on the river.

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[93] CR 2009/3, p. 16 (Crawford).

[94] E.g., CMN, paras. 4.2.19-4.2.23.

[95] MCR, Vol. 6, Ann. 209.

[96] RCR, para. 3.86.

[97] RN, paras. 5.63 *et seq.*

41. The third reason given by Costa Rica for finding a right of navigation on the San Juan for her public vessels carrying armed police is "for the defence of the common border and the common bays under Article IV of the Treaty"[98]. Mr. President, I will not repeat my earlier discussion of why it is neither permitted by Article IV nor necessary for Costa Rica to navigate on the river to defend the "common border [or] the common bays".

42. Costa Rica's fourth and final reason for finding a right of navigation on the San Juan for her public vessels carrying armed police is that "it would be impossible, without adequate re-supplying of the border posts, to prevent or deter unlawful activities in the (land) border area — smuggling, trafficking in persons. It would also be impossible to fulfil official acts such as police investigations in a timely manner."[99] Mr. President, this is effectively an argument that needs, or perhaps even wishes, create rights. But in this case, in light of the evidence, what Costa Rica actually seems to be saying is that it would be easier for her to perform these tasks via Nicaraguan sovereign territory, the river, not that it would be impossible to perform them unless she were allowed to navigate with her public vessels on the San Juan. If roads are muddy or even non-existent, it is the responsibility of Costa Rica, not Nicaragua, to maintain or construct them. Policing the river, after all, is a function reserved to the sovereign, Nicaragua. This is not Costa Rica's right or responsibility. Even if, purely hypothetically, it would be impossible for Costa Rica to perform these functions without using the river, this obviously does not create a right for her to do so. If she wished to complement the policing of the river by Nicaragua, she would of course be free to seek permission from Nicaragua for such navigation.

43. Costa Rica then turns to the one kind of public vessel that President Cleveland did permit to navigate on the San Juan: vessels of the revenue service. Seizing upon the second condition placed by President Cleveland upon navigation by Costa Rican revenue vessels, namely, that it must be "necessary to the protection of" navigation "con objetos de comercio", Costa Rica asserts that "this clearly points to defence matters". On the contrary, nothing could be less clear. President Cleveland, having banned Costa Rican warships from the San Juan, would hardly have allowed Costa Rica to use revenue vessels as a kind of naval Trojan horse to permit navigation on

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[98] RCR, para. 3.86.

[99] RCR, para. 3.86.

the river by her warships. Costa Rica simply cannot point to anything in either the 1858 Treaty or the 1888 Arbitral Award that permits navigation on the San Juan by Costa Rican revenue vessels carrying armed personnel that have nothing to do with her navigation "con objetos de comercio".

44. Mr. President, Members of the Court, this concludes my intervention this morning. I thank you for your courtesy, patience and kind attention and I ask that after the break you call once again upon my colleague, Mr. Paul Reichler. Thank you very much.

The PRESIDENT: I thank Professor McCaffrey for his presentation. Before calling on Mr. Reichler to make his presentation, the Court will have a short coffee break.

The Court adjourned from 11.45 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. I now invite Mr. Reichler to take the floor.

Mr. REICHLER:

COSTA RICA'S NAVIGATION ON THE SAN JUAN RIVER WITH PUBLIC VESSELS: THE PRACTICE OF THE PARTIES

1. Thank you again, Mr. President, Members of the Court. I am doubly honoured today, to appear twice before this distinguished Court. However, I do promise to be shorter this time.

2. My task now is to discuss the evidence that the Parties have placed before you on the practice with regard to navigation by Costa Rican public vessels. As Professor McCaffrey demonstrated, under the 1858 Treaty of Limits and the 1888 Cleveland Award, Costa Rica has no right to navigate on the river with any public vessels other than revenue vessels, and no right to navigate on the river even with revenue vessels unless it is related to and connected with navigation "con objetos de comercio".

3. Because the Treaty of 1858 and the Cleveland Award are clear as well as controlling on these points, there really is no need for the Court to look beyond the language of these legal instruments to discern their meaning. However, *Costa Rica* argues that she has rights to navigate the San Juan River, in public vessels other than her revenue vessels, and in particular, in police vessels bearing arms and engaged in police functions, and in other governmental vessels carrying out typical governmental functions, based on what she claims is the practice of the Parties. It is

Costa Rica's argument that the Parties have mutually manifested such consistent conduct since the Treaty of Limits was adopted that, under the principles of general international law governing the law of treaties, their subsequent practice reflects the existence of an agreement on an interpretation of the 1858 Treaty that would allow a general right of navigation by all Costa Rican public vessels. Mr. President, Members of the Court, Costa Rica fails to hit her mark.

4. Put simply, Costa Rica has not produced evidence that would establish the existence of a mutual course of conduct by the Parties that could be considered, as a matter of law, to reflect an agreement on the interpretation of the 1858 Treaty. The evidence that is before you, especially the evidence submitted by Costa Rica herself, actually disproves her argument about the practice of the Parties. What this evidence shows is: *first*, Nicaragua has never denied or interfered with Costa Rica's right to navigate on the San Juan River with her revenue vessels for purposes related to and connected with commerce. Costa Rica has presented no evidence that she ever actually sought to exercise this particular right, but, more to the point, no evidence that Nicaragua has ever interfered with it.

5. *Second*, the practice of the Parties does not sustain Costa Rica's claim for a right to navigate with police vessels or other governmental vessels to carry out police or governmental functions. In this regard, the evidence shows in particular that Nicaragua has never by her words or her conduct acknowledged, accepted or acquiesced in a right of Costa Rica to navigate on the San Juan River with police vessels or other public vessels carrying government officials engaged in governmental functions. To the contrary, the evidence shows that Nicaragua did not allow any navigation by Costa Rican police or other public vessels, unless Costa Rica first sought and obtained Nicaragua's express authorization prior to the voyage. The evidence further shows that Costa Rica actually complied with Nicaragua's requirements, and sought Nicaragua's authorization prior to her attempts to navigate on the river with her public vessels. And the evidence shows that when Nicaragua refused to authorize the navigation, Costa Rica refrained from navigating. As a consequence, the correct conclusion to be drawn from the evidence regarding the practice of the Parties is that it demonstrates that Costa Rica has *no* right to navigate on the San Juan River with her public vessels, except in the limited circumstance of her revenue vessels navigating in a manner

related to and connected with navigation "con objetos de comercio". And this limited right of navigation has never been denied or abused by Nicaragua.

A. THE EVIDENCE REGARDING NAVIGATION BY COSTA RICAN REVENUE VESSELS

6. Turning to the first of my two points, it is that Costa Rica has not actually exercised her right to navigate on the San Juan River with public revenue vessels, and that Nicaragua, in any event, has never interfered with this right. It is fair to assume that if Costa Rican revenue vessels regularly plied the waters of the San Juan, Costa Rica would have the records to prove it. Similarly, if Nicaragua had ever interfered with this right, by for example, denying a Costa Rican revenue vessel access to the river, it could be assumed that some official records would exist and that Costa Rica would produce them. It is significant then, that Costa Rica has failed to present the Court with any official documentation, or for that matter, any other evidence, establishing either Costa Rica's actual exercise of this right, or again more importantly, Nicaragua's denial of it. Costa Rica's main evidence consists of a very few contemporaneous reports from her fiscal or revenue guards, stationed on land near the San Juan River, between 1893 and 1909. She claims in her written pleadings: "Reports from 1893 to 1909 refer to the substantial activities of the fiscal guards in the region of the border of the San Juan."[100] The Court will note the lack of specificity in the language "in the region of the border of the San Juan", rather than "on the San Juan". The next sentence is equally revealing: "Undoubtedly these fiscal guards used the San Juan to perform their duties."[101] The use of the adverb "undoubtedly" fills the place the Court might expect to find occupied by actual proof of the point that is proclaimed to be undoubtable. There is no such proof. In fact, *none* of the reports from this period that Costa Rica presents make any reference to actual navigation on the San Juan by her revenue vessels. As Nicaragua demonstrated in her Rejoinder, at paragraphs 5.68 to 5.70, and sketch-map 8, at page 256, all of the rivers, police posts and communities mentioned in these reports are located within Costa Rica and were accessible to the fiscal guards from Costa Rica's own rivers, without having to traverse the San Juan. Professor Crawford said on Tuesday that the evidence showed that Costa Rican revenue guards

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[100] MCR, para. 4.89.

[101] *Ibid.*

reconnoitred the San Juan on a weekly basis, but he cited only to a single document in his speech on Tuesday, and that is from 1886, and that document does not say that[102]. The document to which he referred is simply a decree by the Costa Rican Government establishing the revenue guards and their duties, which do pertain in part to the San Juan; but it says nothing about their actual conduct[103].

7. From there, the documentary evidence submitted by Costa Rica leaps all the way forward to 1968, with no evidence of practice by her fiscal guards or revenue vessels during the intervening period. The 1968 reports, like the earlier ones say nothing, demonstrating actual navigation by fiscal guards or revenue vessels *on the San Juan*[104].

8. Subsequent to these inconsequential documents from 1968, there are no other public or official records submitted by Costa Rica regarding the activities of her fiscal guards on or near the San Juan River. Thus, for the entire period from the 1858 Treaty to the present, there is really no official report or record demonstrating any actual physical navigation on the San Juan by any revenue vessel of Costa Rica.

9. Now, there is an explanation for this evidentiary void. The international trade that Costa Rica hoped to conduct via the San Juan at the time of the 1858 Treaty never materialized. This was explained in considerable detail yesterday by my esteemed colleagues Professor Remiro Brotóns and Professor Alain Pellet. For the reasons described by my dear friends, Costa Rican trade on the river became so insignificant that Costa Rica eventually closed down her customs posts along the San Juan, and even closed down the customs posts at the headwaters of the internal rivers that connected to the San Juan[105]. Thus, while Costa Rica most definitely retained, and retains to this day, the right to navigate on the San Juan with revenue vessels related to and connected with navigation "con objetos de comercio", in fact she has found no or extremely little need to exercise this right because there simply *has been no* Costa Rican navigation "con objetos de comercio" of any consequence, and thus nothing that has required the

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[102] See CR, 2009/3, p. 17, para. 33.

[103] MCR, Ann. 206, Art. 5.

[104] See RN, para. 5.72.

[105] See RN, paras. 3.53, 4.10-4.11; RN, Vol. II, Ann. 50.

presence of customs posts or the deployment of her revenue vessels to the San Juan. Costa Rica cannot blame her failure to exercise this right on Nicaragua. There is no evidence to support such an accusation. In particular, there is no evidence that Nicaragua discouraged Costa Rica from exercising her right, or violated it in any way. To the contrary, even if Costa Rica were able to present evidence of some actual use of the river by her revenue vessels, Nicaragua has always acknowledged and respected this treaty right, and continues to do so. There has been no violation.

B. THE EVIDENCE REGARDING NAVIGATION BY COSTA RICAN POLICE VESSELS

10 .The second of my two points on the practice of the Parties concerns the evidence offered by Costa Rica of her navigation on the San Juan with public vessels other than revenue vessels, and for purposes unrelated and unconnected to "objetos de comercio".

11. Costa Rica has presented only two official records showing navigation by her police vessels on the San Juan. The earliest of these is from May of 1992. That is, 134 years after the 1858 Treaty entered into force. There are no official records of any such practice during those first 134 years. Professor Crawford referred to the May 1992 report on Tuesday. He said that the document, and I quote him, "indicates that it was usual for them to patrol the San Juan River"[106]. Actually, this is a bit of an overstatement. Once every 134 years should not count as "usual". What the document actually describes is a single Costa Rican patrolling exercise on the San Juan, in a single abbreviated sentence[107]. There is no indication of the purpose of the exercise, or whether prior authorization was sought or given by Nicaragua.

12. Costa Rica has submitted only one other document from her official records showing that her police vessels navigated on the San Juan River. This is a record kept by the senior police official at Costa Rica's Sarapiquí border post, and it covers the period 1994 to 1998[108]. It is rather remarkable that Costa Rica claims a right based on the prolonged, consistent and uninterrupted practice of the Parties, but can do no better than produce a single public record, covering only a four-year period (save for a single isolated episode in 1992), evidencing that this practice occurred. Evidently, there are no other official records supporting this so-called practice during the entire

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[106] See CR 2009/3, p. 17, para. 33.

[107] See RCR, Vol. 2, Ann. 38.

[108] MCR, Vol. VI, Ann. 227.

history of the Treaty's existence. This in itself attests to the weakness of Costa Rica's claim. The document covering the period between 1994 and 1998 does make reference to some 60 occasions, around one occasion per month, when Costa Rican police vessels traversed the San Juan to bring personnel or supplies to border posts or to engage in law enforcement activities[109]. It makes no mention whether authorization from Nicaragua was sought, or was not sought, prior to these activities.

13. This information is supplied in another contemporaneous, official record, produced by Nicaragua as an Annex to her Rejoinder. This is an aide-memoire of a meeting that took place in July 2000 between Costa Rica's Minister of Public Security and the Commander of Nicaragua's army, and other senior security officials of both States, in which they discussed navigation on the river by Costa Rican vessels during the same pre-1998 period that is covered by Costa Rica's official report[110]. The aide-memoire is located in your judges' folder, and the pertinent portion is projected on the screen. In that meeting, the International Legal Adviser to Costa Rica's Ministry of Public Security, Colonel Carlos Alvarado Valverde, stated that, prior to July 1998 when Nicaragua stopped authorizing use of the river by Costa Rican police vessels, those vessels navigated "with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each post that the boat passed"[111]. Costa Rica's Minister of Public Security, Mr. Rogelio Ramos Martínez, then proposed the re-establishment of the same conditions, which he described as the "*status quo* before 1998"[112]. The document sustains Nicaragua's position that Costa Rican police vessels only navigated on the San Juan after seeking and obtaining prior permission from Nicaragua.

14. Subsequent to the close of the written pleadings, Costa Rica sought and obtained from the Court permission to submit additional documents. One of these is an affidavit from her Colonel Walter Navarro, who declared that he was the Director of the Costa Rican police from May 1998 until February 2006. Colonel Navarro was present, as one of Costa Rica's three

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[109] See RN, para. 5.78.

[110] RN, Vol. II, Ann. 68.

[111] *Ibid.*, pp. 423-424.

[112] *Ibid.*, p. 423.

representatives, at the July 2000 meeting that is recorded in the aide-memoire. It is significant, then, that he makes no mention whatsoever of that meeting in his affidavit, no mention of the aide-memoire, and offers no specific denial of the statements attributed to the Costa Rican Minister of Public Security or the Ministry's International Legal Adviser whom the aide-memoire recorded as acknowledging that Costa Rican police vessels never navigated on the San Juan except "with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each post that the boat passed". Colonel Navarro's failure to respond directly or even mention the aide-memoire, in an affidavit submitted more than four months after Costa Rica received it as part of Nicaragua's Rejoinder, in which it was prominently discussed, confirms both the authenticity and the reliability of the document. Equally revealing is the failure of Costa Rica to produce affidavits from either of the other two of her senior officials who attended the July 2000 meeting. It can be presumed that if either the Minister of Public Security, Mr. Ramos Martinez, or the International Legal Adviser, Colonel Alvarado Valverde, were prepared to contradict the statements attributed to them in the aide-memoire, Costa Rica would have submitted their affidavits along with that of Colonel Navarro. The fact that Costa Rica did not do so further confirms that the statements attributed to her senior officials in the aide-memoire were made.

15. The responses of Costa Rica's counsel to this document, on Monday and Tuesday, have only served to underscore its reliability. Ms Parlett chose to ignore it. She said that the evidence that supports Nicaragua's assertion that Costa Rican police only navigated on the San Juan after requesting and obtaining Nicaragua's authorization consists entirely of affidavits from Nicaraguan army officers, which, she said, should not be believed. She insisted that, apart from these affidavits no documentary evidence supports this[113]. She made no mention of the July 2000 aide-memoire. Professor Crawford knew better than to ignore it completely. But his approach was no more successful than Ms Parlett's. He suggested that the Court should dismiss it because "there is no indication it was approved or even seen by anyone from the Costa Rican side"[114]. Well, we know they saw it eight months ago, when it was submitted to the Court as an annex to Nicaragua's Rejoinder; we know that that they had every opportunity to discredit it in the intervening period, as

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[113] CR 2009/3, p. 51, para. 27.

[114] CR 2009/3, p. 19, para. 40.

part of their post-pleading submission of documents, including affidavits; we know that Colonel Navarro made no reference to it in his recent affidavit; and we know that no denials or disavowals were submitted by either of the two other Costa Rican officials whose words were recorded in it. Put simply, we know that Costa Rica has had every opportunity to present evidence contradicting the aide-memoire, and has failed to do so.

16. And Professor Crawford knows this, as well, which is perhaps why he falls back to the argument that the document simply "should be given no weight" because it does not bear the authentication of its author, Colonel Molina. It is actually this *argument* that should be given no weight. The aide-memoire is authenticated by the affidavit of General Javier Carrión, the Nicaraguan Army Commander who headed Nicaragua's delegation to the meeting. His affidavit is in turn authenticated by the same Colonel Molina, who notarized it. He was bound by law to assure that it contained no untrue statements before notarizing it. In any event, if the Court requires further confirmation of the authenticity of the aide-memoire, its author, Colonel Molina, is here with us in The Hague as part of Nicaragua's official delegation, and he is available to respond to any questions from the Court.

17. The affidavits Nicaragua has presented provide further confirmation of the practice of the Parties prior to 1998. Nicaragua has submitted affidavits from five different military commanders who were each responsible for maintaining security on the San Juan River between 1979 and 2007. Their testimony confirms that, prior to the middle of 1998, Costa Rican police vessels did not navigate on the river unless they had obtained prior authorization from the Nicaraguan army[115], and that they engaged in law enforcement activities on the river when they were invited to do so by Nicaragua as part of a joint law enforcement exercise[116]. The procedure for the supply missions was as follows[117]: a Costa Rican police official would request authorization to navigate on the San Juan to resupply posts. This was done verbally. Nicaragua, also verbally, would grant it. The Costa Rican vessel reported to Nicaraguan military posts upon entering and exiting the river.

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[115] See RN, paras. 5.80-5.85; *ibid.*, Vol. II, Anns. 68, 69, 72, 73, 77, and 78.

[116] See RN, paras. 5.102-5.108.

[117] See *ibid.*, paras. 5.80-5.85; *ibid.*, Vol. II, Anns. 68, 69, 72, 73, 77, and 78.

While transiting on the river, all service arms were stowed on the floor of the Costa Rican vessel. A Nicaraguan soldier remained on board throughout the journey on the San Juan.

18. The documentary evidence submitted by *Costa Rica* confirms that on those few occasions when Costa Rican police have conducted law enforcement activities on the river, it was *always* with Nicaragua's express permission. Costa Rica has introduced only three documents addressing law enforcement activities on the river, one from 1892, one from 1995, and one from 1998. The 1892 document was mentioned by Professor Crawford[118]. It does not support his argument that Costa Rica has unilateral rights to navigate on the river for law enforcement purposes. It is a report from the Chief of the Guard at the Colorado River in Costa Rica in which he expressly states that the Nicaraguan authorities granted him the power to seize contraband and criminals "along the coasts of Nicaragua", on the condition that he permit Nicaragua to enter Costa Rican territory to do the same[119]. The document tends to disprove the existence of the right Costa Rica claims, not to prove it.

19. Similarly, the 1995 document is a joint communiqué issued by the Nicaraguan Army and the Costa Rican Ministry of Public Security, reflecting the Parties' agreement to undertake joint law enforcement activities throughout the border area[120]. Obviously, such joint activities, wherever they might take place, could only occur with the agreement of Nicaragua. The final document Costa Rica invokes, which is dated 1998, mentions law enforcement operations in 1995 and 1996 carried out "in co-ordination with" or "to co-operate with" Nicaraguan authorities[121]. Again, by definition, co-ordination and co-operation with Nicaragua can only occur with Nicaragua's authorization. In sum, none of the documents submitted by Costa Rica shows that Costa Rican police vessels ever unilaterally, or without prior permission from Nicaragua, navigated on the river to bring personnel and supplies to border posts, or to conduct law enforcement activities, or for any other purpose. The Parties' practice is inconsistent with the claim advanced by Costa Rica in these proceedings that she has a right of free navigation with her police vessels.

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[118] See CR 2009/3, p. 17, para. 32.

[119] See MCR, Vol. VI, Ann. 210.

[120] See *ibid.*, Vol. II, Ann. 27.

[121] *Ibid.*, Vol. VI, Ann. 227.

C. THE WITHDRAWAL OF NICARAGUA'S AUTHORIZATION OF NAVIGATION BY COSTA RICA'S POLICE VESSELS

20. The evidence establishes what the practice of the Parties was in this regard until the middle of 1998. The evidence also establishes that this "status quo", to quote Costa Rica's Minister of Public Security, was disturbed in July of 1998[122]. In the words of Costa Rica's Memorial, projected on the screen and located in your judges' folder: "[I]n the period after July 1998, Nicaragua adopted a policy which involved systematic and permanent violations of Costa Rica's rights, which continue to the present day"[123], in the period *after* July 1998. Costa Rica's reference to July 1998 is significant. That is when Nicaragua advised Costa Rica that Costa Rican police vessels would no longer be authorized to navigate on the San Juan River, and, as a consequence, all such police navigation terminated. Costa Rica's statement that Nicaragua's alleged systematic violations of her rights began in July 1998 effectively admits that her rights were not systematically violated by Nicaragua prior to that date: and that whatever the status quo was prior to that date did not constitute a systematic violation of her rights. In other words, the principal violation of her rights for which Costa Rica seeks redress in this Court is Nicaragua's refusal, after July 1998, to authorize Costa Rican police vessels to carry out armed navigation on the San Juan River for police purposes wholly unrelated to navigation "con objetos de comercio". It would seem that this is why we are in court today.

21. The circumstances leading up to Nicaragua's decision in July 1998 to prohibit further navigation on the river by Costa Rican police vessels have been detailed in Nicaragua's Rejoinder. To summarize, the evidence presented there shows that Costa Rica's newly-elected President and his Public Security Minister, Juan Rafael Lizano, adopted a new policy in May of 1998, in response to what *they* perceived as an increase in illegal immigration from Nicaragua across the San Juan, as reflected in Annex 19 of Nicaragua's Rejoinder. Thereafter, for the first time, Costa Rica began to send her armed police vessels onto the San Juan, without requesting prior authorization from Nicaragua, for the purpose of intercepting Nicaraguans thought to be illegally bound for Costa Rica. According to the documentary evidence Costa Rica submitted to the Court before the close of the written pleadings — the documentary evidence that *Costa Rica* submitted to the Court

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[122] RN, Vol. II, Ann. 68, p. 423.

[123] MCR, para. 3.02.

before the close of the written pleadings — her police vessels transported detained Nicaraguans at gunpoint on the San Juan River in June of 1998[124].

22. According to the same Costa Rican Annex, Nicaragua protested immediately. In particular, the Costa Rican police commander at Sarapiquí recorded that Nicaragua's commander, Colonel — now Brigadier General —Talavera, protested Costa Rica's actions[125]. This, however, did not deter Costa Rica from continuing to execute her new policy, and the Costa Rican police commander's record shows further Costa Rican incursion onto the river, and detention and transport of Nicaraguan nationals on 14 June 1998[126]. The same Costa Rican official record says that, in response to these detentions, on 14 July 1998, Nicaragua, in the person of Colonel, now General Talavera, prohibited any further navigation by the Costa Rican police on the San Juan[127]. Nicaragua submitted an affidavit from General Talavera confirming these facts as reflected in Costa Rica's own documents. But what is most significant about them is that they are contained in Costa Rica's own documents, submitted to the Court as part of her written pleadings.

23. However, apparently, Costa Rica now takes issue with her own contemporaneous official record. Costa Rica attempts to rewrite history belatedly via the affidavit of Colonel Walter Navarro, submitted after the close of the written pleadings. According to Colonel Navarro, "neither he personally nor any of his subordinates issued instructions for the detention of Nicaraguan citizens on the San Juan River, and that he is not aware that it ever happened . . ."[128]. It will not escape the Court's notice that this statement is directly contradicted by Costa Rica's own official police report. As I have just mentioned, Costa Rica's documentary evidence, recorded by the police commander at the Sarapiquí border post — who, by the way, was directly under Colonel Navarro's command after 8 May 1998 — states that apprehensions of Nicaraguans occurred during June 1998. Also contradicted by that Costa Rican police report is Colonel Navarro's statement that "the Nicaraguan Government never issued any formal protest"

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[124] See *ibid.*, Vol. VI, Ann. 227, p. 963.

[125] See *ibid.*

[126] See *ibid.*

[127] See *ibid.*, p. 964.

[128] Costa Rica late submissions *(d)*, para. Fifth.

about the detentions of Nicaraguan citizens on the San Juan[129]. But according to the 14 June 1998 entry in the Costa Rican police report:

> "Colonel Talavera [of the Nicaraguan Army] complained that no one navigating the San Juan should be detained, since according to [Colonel] Talavera, some days ago some officers from Delta Zero [that is another Costa Rican police post on the bank of the river] had forced some persons to get off the boat."[130]

The report further records that on 14 July, Nicaragua, based on these and other detentions of her nationals by the Costa Rican police, announced that she would no longer authorize Costa Rican police vessels to navigate on the San Juan[131]. Nicaragua submits that, as between the contemporaneous official police record submitted by Costa Rica with her written pleadings, and the affidavit generated by Colonel Navarro more than ten years after the fact and in the context of litigation, it is the former that should be given credence.

24. It was this decision by Nicaragua to stop authorizing navigation by Costa Rican police vessels that led, ultimately, to the meeting between Costa Rica's Minister of Public Security and Nicaragua's army commander, and other senior security officials of both States in July 2000, that is recorded in the aide-memoire that I previously discussed and displayed to the Court. Costa Rica sought the meeting to persuade Nicaragua to reinstate "the *status quo* from before 1998", which her officials described in the manner that I read out to the Court. In that meeting, both Parties recognized that it was Costa Rica's breach of the status quo — and in particular her unauthorized navigation on the San Juan River for the purpose of detaining and transporting, under force of arms, Nicaraguan nationals thought to be planning to migrate unlawfully into Costa Rica — that prompted Nicaragua to stop authorizing navigation by Costa Rican police vessels. It must be noted that Colonel Navarro of Costa Rica, in his affidavit, denies that he personally ever asked permission of Nicaragua for his forces to navigate on the San Juan and never discussed the question of permission with any Nicaraguan army officers. Well, it is precisely this behaviour by Colonel Navarro, after he was appointed to his post in May 1998, which led to the difficulty and Nicaragua's decision to stop authorizing navigation by the Costa Rican police two months later.

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[129] *Ibid.*

[130] MCR, Vol. VI, Ann. 227, p. 963.

[131] See *ibid.*, p. 964.

But whatever reason for deciding to stop authorizing navigation by the Costa Rican police, it was within Nicaragua's right to do so as sovereign over the river, because Costa Rica's right of free navigation "con objetos de comercio" does not include a right of her police vessels to navigate on the San Juan in the exercise of police functions. These are the facts, and they all point in one direction: That the practice of the Parties does not support — indeed it thoroughly refutes — Costa Rica's contention that she has a right to navigate on the San Juan River with her police vessels.

D. THE EVIDENCE REGARDING NAVIGATION BY OTHER GOVERNMENT VESSELS

25. The same conclusion that applies to navigation with police vessels applies to navigation with other Costa Rican public vessels engaged in carrying out governmental functions unrelated to "objetos de comercio". Costa Rica has no right of navigation with those other public vessels under the Treaty of 1858 or the Cleveland Award. Even so, Nicaragua does not — as would be her sovereign right — prohibit Costa Rica from navigating on the river for purposes of delivering medical, educational or other social services to Costa Rican citizens on the right bank of the river. Nicaragua requires only that Costa Rican public vessels and officials register with Nicaraguan authorities upon entering and exiting the river and comply with any applicable visa requirements[132]. I discussed the lawfulness and reasonableness of these regulations in my earlier speech and need not repeat that here. Since there is no right of Costa Rica to navigate with public vessels for ordinary governmental purposes, unrelated to "objetos de comercio", Nicaragua cannot be properly accused of violating a right that Costa Rica does not possess, especially when Nicaragua consents to the navigation subject only to the reasonable requirements I have mentioned.

26. Now, I would be less than candid if I did not admit that I was impressed by the very powerful emotional content of Ms Parlett's presentation on Tuesday. After all, who would not be moved by the picture she painted of 450 Costa Ricans, including 200 children, deprived of basic health services, including inoculation against screw worm and other diseases? But as is often the case with such appeals to the heart, the law gets redesigned or ignored entirely in order to provide a remedy for the compelling set of facts depicted by counsel. Thus, Ms Parlett tells us that

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[132] See RN, paras. 5.109-5.112.

Costa Rica's right under the 1858 Treaty "includes navigation by government officials to provide essential services to local communities"[133]. Ms Parlett nowhere explains how or why this statement is justified. She merely states her conclusion and moves on to her version of the facts, which she finds more felicitous to her argument. I trust by now that it is clear that no such legal right can be found in the 1858 Treaty, the Cleveland Award or the practice of the Parties. There is no right of navigation with public vessels for the purpose of delivering governmental services.

27. Furthermore, the facts are not as felicitous as Ms Parlett very skilfully portrays them. She overreaches when she contends that subsequent to 1998 Nicaragua has "prevented" Costa Rica from delivering "services to the local population, including health, education and security"[134]. There is no evidence to support this sweeping statement. It is true that Nicaragua requires Costa Ricans, who are not residents of the right bank, including Costa Rican officials, to obtain a visa before entering Nicaraguan territory, but there is no evidence that this requirement has had anything close to what Ms Parlett described as "detrimental consequences" for the local residents[135]. Much attention was paid to the solitary case of Dr. Ching, whose efforts to obtain a Nicaraguan visa were described at some length. What Ms Parlett neglected to mention was that Dr. Ching in fact received a Nicaraguan visa[136].

28. It is a fact, and Nicaragua acknowledges it, that there have been bureaucratic inefficiencies which have resulted in delays in the issuance of some visas. Ms Parlett has identified two or three such instances, which Nicaragua regrets. However, these are isolated cases and they do not prove that it was Nicaragua's policy to deny or delay visas for Costa Ricans or access to the river. It was not. Moreover, Costa Rica herself acknowledges, in her Reply, that by May of 2007, Nicaragua was indeed expeditiously granting visas so that Costa Rican officials could deliver governmental services to local residents via navigation on the San Juan[137].

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[133] CR 2009/3, p. 49, para. 19; emphasis added. See also *ibid.*, p. 44, para. 6; p. 45, para. 8.

[134] CR 2009/3, p. 44, para. 3.

[135] CR 2009/3, p. 44, para. 4.

[136] RN, para. 5.112: CMN, paras. 6.2.14-6.2.15.

[137] RCR, paras.4.36-4.37 ; RN, para. 5.112.

E. CONCLUSION

29. Mr. President, Members of the Court, this brings me to my conclusion. I can state it simply. Costa Rica has no right of navigation on the San Juan River with her public vessels for the purpose of carrying out police or other governmental functions. The 1858 Treaty of Limits and the Cleveland Award carved out a right beyond, but inextricably connected to, the right of navigation "con objetos de comercio". That is the right of vessels of Costa Rica's revenue service, and *only* her revenue service, to navigate on the river when it is related to and connected with navigation "con objetos de comercio", and *only* when it is related to and connected with navigation "con objetos de comercio". Professor McCaffrey has demonstrated that the 1858 Treaty and the Cleveland Award are susceptible of no other interpretation. It has been my purpose to show that the practice of the Parties, likewise, permits no other interpretation.

30. Mr. President, Members of the Court, I thank you once again for your patience and your kind attention. I ask you to please call upon Professor Pellet as Nicaragua's next, and final, speaker of this round.

The PRESIDENT: I thank Mr. Reichler for his presentation. I now invite Professor Alain Pellet to take the floor.

M. PELLET : Thank you very much, Mr. President. I am afraid, I have to beg your kind indulgence, but my presentation will last 20 minutes.

REMÈDES — UNE RÉPONSE AU PROFESSEUR CRAWFORD

1. Monsieur le président, Messieurs les juges, le professeur Crawford s'est félicité d'être admirablement concis («commendably brief»)[138] au sujet des remèdes demandés par le Costa Rica. Je vais essayer de le concurrencer sur ce terrain de la brièveté … aussi peu familier qu'il nous soit à l'un comme à l'autre !

2. Sans m'employer à faire un tour complet des problèmes relatifs aux «remèdes» dans cette affaire[139], je répondrai à mon contradicteur — mais toujours aussi ami — en distinguant la question

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[138] CR 2009/3, p. 63, par. 4.

[139] Contre-mémoire du Nicaragua (CMN), p. 239-249, par. 7.1.1-7.2.6 ; Duplique du Nicaragua (DN), p. 299-327, par. 6.1-6.49.

des déclarations, que les deux Parties vous demandent de faire, des autres demandes en réparation, aussi nombreuses que variées, formulées par le Costa Rica.

I. LES DEMANDES DE DÉCLARATIONS ADRESSÉES À LA COUR

3. Monsieur le président, comme l'a rappelé James Crawford, les deux Parties prient la Cour de mettre fin, par une ferme déclaration, aux incertitudes qui subsistent sur la portée de leurs droits et obligations respectifs en vertu du traité Cañas-Jérez de 1858. Et nous avons noté avec intérêt, de ce côté-ci de la barre, que la Partie costa-ricienne semble avoir renoncé à mettre en doute la recevabilité de la demande formulée à cette fin par le Nicaragua. Ceci me semble à la fois avisé et juridiquement équitable : parce qu'il paraîtrait pour le moins étrange, Messieurs de la Cour, que vous acceptiez de vous interroger, comme la Partie costa-ricienne vous y presse sur les prétendues «violations, par le Nicaragua, des obligations qui sont les siennes envers le Costa Rica» en vertu du traité de limites de 1858, ce qui constitue l'objet premier de la requête[140], et que, dans le même mouvement, vous refusiez de vous prononcer sur la portée des obligations du défendeur en vertu de ce même instrument.

a) La déclaration demandée par le Nicaragua

4. Le Nicaragua prie donc la Cour de bien vouloir énoncer clairement le contenu et la portée des différents droits et obligations établis par le traité de 1858 (tels qu'interprétés par la sentence du président Cleveland), qui continuent à poser problème en matière de navigation. Ce n'est que de cette manière que sera complètement résolu le différend soumis à la Cour, conformément d'ailleurs au vœu que Monsieur l'agent du Costa Rica a lui-même formulé lundi matin[141]. Comme nous l'avons indiqué dans notre duplique[142], il ne s'agit pas là d'une requête reconventionnelle, ni même d'une demande autonome, mais, simplement d'une démarche visant à obtenir que la Cour rejette l'interprétation inacceptable de ses droits et obligations que le Costa Rica la prie d'entériner et qu'elle précise, une fois pour toutes, quels sont les droits et obligations respectifs des Parties en

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[140] Requête, p. 7, par. 1.

[141] CR 2009/2, 2 mars 2009, p. 14, par. 10 (Ugalde-Alvarez)

[142] DN, p. 300-301, par. 6.4.

vertu du traité de Lima de 1858. Ceci peut être fait dans le dispositif de l'arrêt qu'elle est appelée à rendre ou dans ses motifs.

5. La raison des cette demande est simple : comme mes collègues l'ont démontré tout au long de notre présentation, l'objectif principal de la Partie costa-ricienne consiste, pas seulement en plaidoiries, mais aussi par son comportement constant, à rechercher par tous les moyens l'élargissement du droit de libre navigation *con objetos de comercio* que lui reconnaît le traité de 1858 et qu'elle voudrait diluer en quelque chose de tout à fait différent : la reconnaissance pure et simple d'un droit de libre navigation *tout court*, inconditionnel et absolu accompagnée de toute une théorie de droits accessoires. Une telle dilution, qui est au cœur du différend que le Costa Rica a soumis à la Cour, n'est pas acceptable pour le Nicaragua et constitue une source de frictions constantes entre les deux pays riverains du fleuve. Or, il est à peine besoin de le rappeler, «la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue ... pour assurer le règlement régulier de tous les points en litige...» (*Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 25, par. 23 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 463, par. 23. Voir aussi, par exemple : *Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 23, par. 19.)

6. Monsieur le président, je ne puis me livrer à un long commentaire du bien-fondé de chacune des demandes du Nicaragua. Tous ces points ont été déjà présentés dans nos écritures[143] et par mes collègues :

— M^e Reichler a montré que le Nicaragua est indiscutablement en droit de réglementer les activités menées sur le fleuve, et en particulier la navigation, et qu'il peut exiger le paiement de redevances pour les services rendus ayant un lien avec ceux-ci ; et

— le professeur McCaffrey a, pour sa part, rappelé que les activités des bateaux du service des douanes costa-riciennes doivent être strictement liées et limitées à la navigation *con objetos de comercio* ;

— en ce qui concerne le droit du Nicaragua d'entretenir le fleuve et de procéder à l'amélioration de sa navigabilité, nous avons longuement établi dans notre duplique[144] que ce droit existe et peut être mis en œuvre sans que le consentement du Costa Rica soit nécessaire, comme l'a reconnu d'ailleurs expressément la sentence Cleveland[145] ; et

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[143] Voir DN, p. 306-308, par. 6.17.

— il paraît assez évident que le dragage, qui favoriserait (et permettrait de rétablir) la navigabilité du San Juan, est inclus dans l'exercice de ce droit fondamental — qui serait d'ailleurs à l'avantage du Costa Rica si, comme il le prétend, il a un intérêt quelconque à naviguer sur le San Juan avec des marchandises (je veux dire : *con objetos de comercio*…). Nous avons d'ailleurs noté que le professeur Crawford a expressément déclaré l'accord du Costa Rica sur ce point[146].

7. Telles sont donc les raisons, Monsieur le président, pour lesquelles le Nicaragua entend maintenir, dans les conclusions finales qu'il déposera la semaine prochaine, une demande tendant à ce que la Cour déclare formellement qu'il a droit à ce que la pleine souveraineté (*dominium* et *imperium*) qui lui est reconnue par l'article VI du traité frontalier de 1858 soit effectivement respectée par le Costa Rica.

8. En revanche, le Nicaragua ne demande pas à la Cour de se prononcer directement sur les «réserves» qu'il a formulées au sujet du statut juridique du Colorado ou de la pollution existante ou potentielle (liée notamment à la mise en exploitation de la mine d'or de Las Crucitas)[147] : il lui est simplement apparu utile et juste d'informer la Cour de l'existence (regrettable) d'autres différends qui touchent le San Juan et ne sont pas dépourvus de tout lien avec la présente instance.

b) *La déclaration demandée par le Costa Rica*

9. Monsieur le président, pour sa part, le Costa Rica a inclus dans les conclusions de sa duplique une longue liste de prétendues violations à ses obligations relatives au régime du fleuve San Juan qu'il impute au Nicaragua[148]. Nous ne contestons pas la recevabilité de ces demandes et il ne me paraît ni utile ni possible de les reprendre une à une en tout cas pour l'instant : toutes nos

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[144] DN, p. 302-305, par. 6.08-6.16.

[145] MCR, vol. II, annexe 16, p. 99.

[146] CR 2009/3, 3 mars 2009, p. 68, par. 25.

[147] Voir CMN, p. 251, ou DN, p. 325-326, par. 6.49.

[148] RCR, p. 211-212, par. 2.

plaidoiries de ces deux jours ont démontré combien elles étaient infondées. Je me bornerai à deux remarques.

10. La première sera pour mettre respectueusement la Cour en garde contre l'apparente innocuité de ces demandes, peut-être contre leur «bonhomie», qui, sous leur allure technique, veulent vous conduire en réalité, Messieurs les juges, à remettre profondément en cause le régime du fleuve tel qu'il résulte du traité de 1858 interprété par la sentence Cleveland de 1888. Juste un exemple : je ne sais pas quelles ont été vos réactions lors de la projection par James Crawford du garde-côtes le *Forward*[149]. En tout cas, pour moi, cet imposant bâtiment a bien davantage évoqué l'idée d'un navire de guerre justement, que d'un bateau dont l'anodine et sympathique fonction aurait été l'accompagnement des noces du président Cleveland et de Miss Folsom. Or, si vous veniez à faire droit à sa demande, le Costa Rica ne manquerait pas de se prévaloir de cette projection (et de ses plaidoiries sur les bateaux de douane et autres navires officiels) pour envoyer sur le fleuve *nicaraguayen* San Juan des bâtiments qui seraient l'équivalent moderne du *Forward* ou du *Chandler* — je signale d'ailleurs qu'avant d'escorter la future First Lady, le *Chandler* a servi en tant que bâtiment de la marine de guerre américaine et a même, durant la guerre de Sécession, capturé une corvette espagnole[150]. La formulation minimaliste de la conclusion du Costa Rica figurant sous la lettre «g)» (et ce n'est qu'un exemple parmi d'autres) doit être appréciée dans cette perspective. Il en va de même, par exemple, de celle énoncée sous la lettre «i)», sur la pêche de subsistance. Je n'y reviens pas, M^e Reichler en a parlé tout à l'heure.

11. Ma seconde remarque est plus globale. Supposons, Monsieur le président, que la Cour fasse droit aux conclusions du Costa Rica — *visio horribilis* ... mais supposons-le un instant ! Que resterait-il du *dominium* et de l'*imperium* exclusifs du Nicaragua sur le fleuve au regard du droit absolu de navigation revendiqué par le Costa Rica ? Rien — ou pratiquement rien, si ce n'est l'interdiction faite à la Partie costa-ricienne d'y faire naviguer des navires ouvertement «de guerre», tant une telle demande aurait été en contradiction trop flagrante avec la sentence Cleveland. Et encore... : le Costa Rica a une conception tellement extensive de ses soi-disant droits de «protection» et de défense du fleuve, que, conformément à sa tactique constante depuis

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[149] Voir CR 2009/4, p. 16, par. 32 (Gómez) ; voir aussi CR 2009/3, p. 13-14, par. 23.

[150] Voir http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf.

cent cinquante ans, la conclusion figurant sous la lettre «g)» constitue à l'évidence, je viens de le montrer, une nouvelle tentative de «grignotage» qui, dans les faits, remet en cause ce que l'on pensait acquis depuis 1888. Dans cette perspective inquiétante, le Nicaragua se trouverait réduit à n'être qu'un *imperator* privé de *toute* compétence ; un *dominus* qui ne pourrait ni réglementer le tourisme sur le fleuve, ni édicter de règles propres à assurer la sécurité de la navigation sur le fleuve, ni tenter d'en préserver l'environnement ou d'en rétablir la pleine navigabilité, et dont les forces armées (beaucoup plus modestes que celles du Costa Rica : le Nicaragua ne dispose pas de garde-côtes dont le gabarit serait l'équivalent contemporain de celui du *Chandler*) en seraient réduites à assister depuis la rive aux démonstrations de force de la police et des garde-côtes costa-riciens.

12. Le Nicaragua vous prie, Messieurs de la Cour, de rejeter toutes les demandes contenues dans le paragraphe 2 des conclusions du Costa Rica, qui remettent profondément en cause, l'équilibre réalisé par le traité de 1858 tel que la sentence Cleveland l'a interprété.

II. LES AUTRES CONCLUSIONS DU COSTA RICA

13. Monsieur le président, pour le reste, les conclusions du Costa Rica sont «attendues» et le rejet des allégations de violations qu'aurait commises le Nicaragua doit, de toute façon, Messieurs les juges, vous conduire à les rejeter : ce n'est pas au professeur Crawford que je vais apprendre que la responsabilité de l'Etat est engagée — mais n'est engagée que — si un fait internationalement illicite peut lui être attribué. Pas de violation ; pas de responsabilité — ni bien sûr de cessation, d'assurances ou de garanties de non-répétition, ou de dédommagement.

14. Permettez-moi cependant, Monsieur le président, de répondre en quelques phrases aux allégations de mon contradicteur en ce qui concerne la question des injonctions, d'une part ; celle des dommages-intérêts, d'autre part (sans bien sûr que ces réponses constituent de quelque manière que ce soit une reconnaissance de responsabilité de la part du Nicaragua).

15. *Les injonctions* d'abord. Je ne conteste évidemment pas que «[t]he Court gives decisions in its contentious jurisdiction which are binding on States»[151]. Mais ce n'est pas ce dont il s'agit ici

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[151] CR 2009/3, p. 64, par. 8.

— et l'exemple de l'affaire du *Mandat d'arrêt*, opportunément citée par le professeur Crawford[152], illustre parfaitement notre objection : certes, dans cette affaire, la Cour a constaté l'illicéité du mandat d'arrêt délivré à l'encontre de M. Yerodia mais, conformément à sa jurisprudence constante[153], elle s'est gardé d'annuler elle-même le mandat en question et a laissé à la Belgique le soin de le mettre à néant «par les moyens de son choix» («by means of its own choosing») (*Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 32, par. 76 et p. 33, par. 78 C.3). C'est tout ce que voulait dire le Nicaragua : si, par impossible, la Cour en venait à juger que certaines des mesures qu'il a prises pour la protection du fleuve San Juan et la sécurité de la navigation étaient illicites — *quod non !* — il ne lui appartiendrait pas de procéder elle-même à leur «abrogation» comme le demande le Costa Rica[154]. Au surplus, que cela doive être fait par votre haute juridiction ou reconnu comme relevant de la compétence du Nicaragua, de toute manière, il est rigoureusement impossible, à la Cour comme au Nicaragua, de donner suite à cette demande (tout à fait exorbitante) faute pour l'Etat demandeur d'avoir spécifié les mesures législatives et réglementaires dont il réclame l'«abrogation»[155].

16. En ce qui concerne la demande de *dommages-intérêts*, nous ne contestons nullement que ceux-ci pourraient faire l'objet d'une seconde phase de la procédure[156] — *si* les violations alléguées par le Costa Rica étaient avérées — *quod non* à nouveau — *et si* celui-ci apportait la preuve d'un préjudice qu'il n'invoque — également — que de manière si vague et si floue que l'on voit mal comment la Cour pourrait, sur cette base, constater même le principe du droit à réparation du Costa Rica pour, dans une seconde phase, fixer le montant de l'indemnisation réclamée, bien à tort,

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[152] *Ibid.*, p. 64-65, par. 9.

[153] Voir, par exemple, *Concessions Mavrommatis à Jérusalem, arrêt n° 5, 1925, C.P.J.I. série A n° 5*, p. 50 ; *Haya de la Torre (Colombie/Pérou), arrêt, C.I.J. Recueil 1951*, p. 79 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 516, par. 128 7) ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004*, p. 32, par. 31. Voir aussi *CEDH*, arrêt du 18 décembre 1986, requête n° 9697/82, *Johnston et autres c. Irlande*, série A n° 112, par. 77.

[154] Voir MCR, p. 141, par. 6. 13 ; RCR, p. 198, par. 5.15 ; CR 2009/3, p. 64, par. 6 (Crawford).

[155] *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 34-35 ; *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 262, par. 29 ; *ibid.*, p. 466, par. 30 ; et *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 204, par. 76.

[156] Cf. CR 2009/3, p. 66, par. 17 (Crawford).

par le demandeur. Qu'il s'agisse de fixer ce montant dans une phase ultérieure ou de constater — comme dans l'affaire de la *Compétence en matière de pêcheries*, dont le professeur Crawford récuse à tort la pertinence[157] — le principe d'une obligation d'indemniser, le problème se pose de la même manière : même si les preuves de la consistance et de l'étendue des dommages subis peuvent être différées dans le premier cas et non dans le second, «la Cour ne peut formuler une constatation générale de responsabilité sur des questions au sujet desquelles elle ne possède que des renseignements limités et des preuves insuffisantes» («the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence») (*Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 205, par. 76)[158]. Or le Costa Rica demande à la Cour de prononcer, dans ce premier temps, une constatation générale de responsabilité. J'ajoute que si, par impossible, la Cour constatait que le Nicaragua avait manqué à l'une quelconque de ses obligations en vertu du traité de 1858 correctement interprété — décision que nous n'envisageons pas ... — une telle constatation constituerait à l'évidence une réponse amplement appropriée[159].

17. Monsieur le président, j'ai peut-être eu tort de «défier» James Crawford sur le terrain qu'il avait choisi, celui de la brièveté, car — mon ordinateur a compté pour moi — j'ai utilisé un tout petit peu plus de mots et de caractères que lui — mais mes notes sont plus fournies et le français est une langue plus fleurie que l'anglais. Donc, me semble-t-il, à cet égard, «match nul». Par contre, sur le terrain, autrement plus sérieux, du régime juridique applicable à la navigation sur le fleuve San Juan, nous ne pouvons laisser dire ou sous-entendre qu'il s'agirait d'une question mineure[160]. Pour le Nicaragua, c'est un problème de principe qui met en cause sa souveraineté.

Ainsi s'achève, Monsieur le président, Messieurs de la Cour, les plaidoiries du Nicaragua pour ce premier tour. Au nom de toute notre délégation, et au mien, je vous remercie de votre patience et je vous souhaite, ainsi qu'à nos amis costa-riciens, un très bon week-end.

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[157] CR 2009/3, p. 66, par. 17.

[158] Voir aussi la jurisprudence citée dans DN, p. 322-324, par. 6.45.

[159] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 452, par. 319.

[160] CR 2009/3, p. 69, par. 27 (Crawford).

The PRESIDENT: I thank Professor Pellet for his presentation.

This marks the end of the first round of oral argument of the Republic of Nicaragua. The Court will meet again on Monday 9 March at 10 a.m. to hear the second round of oral argument of the Republic of Costa Rica.

I would like to insist that the second round of oral argument should focus on the points raised in the first round of oral pleadings and on replies to those questions that have not been answered. I would like to ask for your co-operation.

The meeting is adjourned.

The Court rose at 1.05 p.m.

CR 2009/6

International Court of Justice | **Cour internationale de Justice**

THE HAGUE | **LA HAYE**

YEAR 2009

Public sitting

held on Monday 9 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua)**

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le lundi 9 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)**

COMPTE RENDU

Present:	**President**	**Owada**
	Judges	**Koroma**
		Al-Khasawneh
		Buergenthal
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Judge *ad hoc*	**Guillaume**
	Registrar	**Couvreur**

The Government of the Republic of Costa Rica is represented by:

H.E. Mr. Edgar Ugalde-Alvarez, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit International; Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

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Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,

Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit International de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

The PRESIDENT: Please be seated. The sitting is open. I note initially that Judge Shi, for reasons made known to me, is unable to take his seat on the Bench today.

The Court meets today to hear the second round of oral argument of the Republic of Costa Rica. I now give the floor to Professor Crawford.

Mr. CRAWFORD:

I. GENERAL ISSUES OF INTERPRETATION

Introduction

1. Mr. President, Members of the Court, in this opening, I will deal with three issues of a general character, under each of which I will subsume arguments made by different counsel for Nicaragua last week.

A. Sovereignty and the perpetual right of free navigation

2. The first issue is the relationship between sovereignty and a perpetual right of free navigation. Professor Brownlie dealt with this at length[1] — without, however, always avoiding caricaturing our actual position. For example, he attributed to us the view "that the right of navigation referred to in the 1858 Treaty is in some sense absolute or peremptory"[2]. In fact the word "peremptory" appears nowhere in our pleadings. The word "absolute" appears four times. Three times it is used to quote the Central American Court of Justice judgment which says that Nicaragua's ownership of the river is "neither absolute nor unlimited"[3]. It is used once to say that Nicaragua's sovereignty is not absolute but is subject to limitations established by treaty[4]. The paragraphs of the Reply actually cited by Professor Brownlie state that Nicaragua cannot limit Costa Rica's right of navigation, but they do not suggest that Costa Rica's treaty right is superior to Nicaragua's sovereignty. The two coexist, as they coexist in Article VI of the Treaty.

3. But I would note now that Professor Brownlie has suggested it that the word "peremptory" could be justified — not peremptory in the sense of Article 53 of the Vienna Convention, but

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[1] CR 2009/4, pp. 19-20, paras. 4-9 and pp. 29-35, paras. 46-67.

[2] CR 2009/4, p. 30, para. 53, citing RCR, paras. 3.13.-3.25.

[3] MCR, para. 2.46; RCR, para. 2.10; RCR, para. 3.33.

[4] RCR, para. 3.09.

peremptory in the sense of something required or demanded as of right; something not to be interfered with. The Permanent Court in the *S.S. "Wimbledon"* case used the phrase "general and peremptory" of Article 380 of the Treaty of Versailles, which required the Kiel Canal to be "maintained free and open to the vessels of commerce and war of all nations at peace with Germany" (*Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 21): evidently in Article 380 vessels of commerce included passenger ships. Article VI of the Treaty of Limits is bilateral rather than general, but it is equally peremptory in the sense used by the Permanent Court.

4. (Tab 52) In 1858 Costa Rica expressly recognized Nicaragua's sovereignty over the waters of the San Juan. But this sovereignty is conditioned by the rights of free navigation granted to Costa Rica. Nicaragua made the point itself in its Counter-Memorial:

> "The right of free navigation appears as a *qualification* of the sovereignty of Nicaragua and is introduced by the term 'pero' (but). Thus a *particular* right of Costa Rica is presented as a qualification of the *general* grant of rights (in the form of title (dominio) and sovereignty ('sumo imperio') to Nicaragua."[5]

As you will see from the projection (tab 52 in your folders), the emphasis "qualification" was Nicaragua's itself. Its "dominio y sumo imperio" is qualified in the very same sentence by the rights of free navigation of Costa Rica.

5. Costa Rica agrees with the analysis in these passages of the Counter-Memorial, but it seems that Nicaragua does not. Now it is sovereignty which overrides rights; the general trumps the particular. Thus according to Professor Brownlie:

> "whatever the precise nature and extent of Costa Rica's rights . . . Nicaragua must have the exclusive competence to exercise the following regulatory powers:
>
> ……………………………………………………………………
>
> *(e)* the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty; that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award"[6].

6. This is, with all respect, an extraordinary statement. Nicaragua is apparently to have "*exclusive* competence" with regard to "the maintenance of the discipline of the Treaty as such". That sounds to me like auto-interpretation — a recipe for indiscipline, not discipline; and certainly not respect for international law.

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[5] CMN, para. 2.1.48.

[6] CR 2009/4, pp. 35-36, para. 67.

7. That is not how the Permanent Court, your predecessor, saw the relationship between sovereignty and obligation in the context of transit rights. In the *S.S. "Wimbledon"* case, Germany argued that the terms of a treaty should be restrictively interpreted because it impinged on Germany's sovereignty. The Court — in one of its most famous passages —

> "decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State . . . But the right of entering into international engagements is an attribute of State sovereignty." (*Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 21.)

8. Professor Brownlie cited another famous passage, this time of this Court in the *Temple* case, on the finality of boundary settlements (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34)[7]. He added:

> "In the present case, the analogy with the *Temple of Preah Vihear* case arises not from the line of the boundary as such but from the danger of permitting a régime of navigation which would introduce an element of legal porosity and instability into the otherwise lucid attribution of territory."[8]

9. But it is the 1858 Treaty itself which explicitly permits a perpetual right of free navigation, navigation which is itself a "continuously available process", or should be. Professor Brownlie invites you to give effect to the boundary defined in the first part of Article VI but to restrictively interpret, if not eviscerate, the régime of free navigation introduced with the word "pero" and set out in the second part of Article VI and elsewhere in the Treaty. It is Nicaragua that thereby seeks to revise, as distinct from interpreting, the settlement of 1858.

B. The Character of the Treaty of Limits

10. This brings me to my second general point — the character of the Treaty of Limits. As to this, Nicaragua made three main arguments.

(a) *Nicaragua's "cloud of duress"*

11. The first point was made by Nicaragua's distinguished and experienced Agent, who said: "During the next 30 years after the signing of the Treaty of Limits, it caused great resentment in

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[7] CR 2009/4, p. 20, para. 7.

[8] CR 2009/4, p. 20, para. 8.

Nicaragua that this Treaty had been signed under a cloud of duress."[9] It is true that the circumstances surrounding the conclusion of the Treaty of Limits demonstrate the existence of a serious conflict over canalization issues, but they do not come close to establishing duress, or even a cloud of duress — I am not sure what I would prefer, duress or a cloud. Three quick facts refute this claim . . .

12. *First*, the negotiations were mediated and countersigned by a representative of a neutral State, Salvador. I invite the Court to read the Additional Act accompanying the Treaty of Limits, in which the negotiators expressed their "feelings of gratitude" for the "estimable" and "impartial" assistance provided by the mediator[10]. There is no trace of duress.

13. *Secondly*, the decree of the President of Nicaragua, approving and ratifying the Treaty of Limits specifically confirmed that it had been concluded by General Jerez firmly "in accordance with the bases which, for that purpose, were transmitted to him by way of instructions", a finding which the Nicaraguan Congress later endorsed[11].

14. *Thirdly*, not even Nicaragua pleaded duress before President Cleveland. Instead it relied on constitutional arguments which George Rives rejected as "untenable"[12].

15. Incidentally, it was implied last week that Rives shared the assessment of the Treaty as unfair and unequal so far as Nicaragua is concerned[13]. He certainly did not. In the one passage of his report which might be taken as a comment on the Treaty, he noted:

> "that Costa Rica had for nearly the same period of twenty years [viz., 1838-1858] laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guarantees' of the 8th March, 1841 — which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua and the River San Juan."[14]

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[9] CR 2009/4, p. 11, para. 13 (Argüello).

[10] MCR, Ann. 7, pp. 52-53.

[11] MCR, Complete Annexes, Ann. 207, p. 53.

[12] First Report of George L. Rives, 2 March 1888, CMN, Complete Annexes, Ann. 70, pp. 13, 15, 17.

[13] CR 2009/5, p. 34, para. 21 (McCaffrey).

[14] First Report of George L. Rives, 2 March 1888, CMN, Complete Annexes, Ann. 70, p. 7.

(b) *The "Nicoya theory" is wrong — but anyway it is irrelevant to the interpretation of the Treaty*

16. The second point made under this head by Nicaragua is what I call the "Nicoya theory". It was put forward principally by Professor Brownlie, but with loyal support from Ambassador Argüello and Professor McCaffrey.

17. Nicaragua presented a map attributed to Fermin Ferrer presenting an inflated extension of the Costa Rican province of Guanacaste, mistakenly equated to Nicoya[15]. What Nicaragua failed to mention was that Mr. Ferrer was an associate of William Walker, the notorious Filibuster. Ferrer acted successively as Walker's Provisional President and Minister for Foreign Affairs. Considering Walker's well-known intentions of taking over not merely Nicaragua but the canal route and eventually the rest of Central America, it is no surprise his map portrays Guanacaste as reaching east to the Caribbean and south to the Colorado River[16].

18. (Tab 53) You can see on the screen Professor Brownlie's own graphic, based on Ferrer's map. The area shown in green was labelled by him "Department of Nicoya prior to Treaty". There is almost nothing about this map which is accurate. Nicaragua's case is that this vast area was "usurped"[17] from it in 1824 in violation of the *uti possidetis* principle, and that its cession or relinquishment by Nicaragua was the key feature in the unequal bargain of the Treaty of Limits[18].

19. The first point to note is that there was no breach of *uti possidetis*. This was not the first time in Latin American practice that an administrative unit was detached from one territory to be integrated into another or to be treated as separate. Other examples include Chiapas. On the principle of *uti possidetis* I refer the Court to our pleadings[19].

20. The incorporation of Nicoya in Costa Rica was by free decision of its people, it was not a usurpation. It was ratified by the people of Nicoya no less than seven times[20]. It was confirmed by the Central American Congress in 1825[21]. Professor Brownlie[22] made much of the expression "For

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[15] CR 2009/4, p. 24, paras. 22-23, (Brownlie).

[16] On Ferrer see http://es.wikipedia.org/wiki/Ferm%C3%ADn_Ferrer.

[17] CR 2009/4, p. 10, para. 8, (Argüello).

[18] CR 2009/4, p. 28, paras. 40-41, (Brownlie).

[19] RCR, para. 1.23, and App. 1, paras. A15-A28.

[20] RCR, para. A.17.

[21] CMN, Ann. 55; RCR Ann. 5; RCR, para. A.17.

[22] CR 2009/4, p. 25, paras. 25-26.

the time being" in Article I of the Congress's Decree. In fact the same article explains the reason: "For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made . . ." Article VII provided for the demarcation of the interior States to be carried out by special law once the data were available[23]. That demarcation was never carried out, but the process envisaged by Article VII was one of demarcation, not the retransfer of an unwilling people to an unruly province. As Rives said in his report: "in 1858 Costa Rica had been continuously in possession of the District of Nicoya, under a claim of title, for more than thirty-two years"[24].

21. The Nicoya question became a question for President Cleveland in the following way. If Nicoya was part of Nicaragua before 1858, its cession without the approval of successive Congresses was unconstitutional and on that basis the Treaty of Limits would have been invalid. Rives's First Report thus examined the question in detail.

22. According to Rives:

> "The District of Nicoya lies on the Pacific side of the Continent and — roughly speaking — is triangular in shape, its apex lying towards the South. It is bounded on the Westwards by the Pacific Ocean and on the Eastwards by the Gulf of Nicoya and the Rio del Salto . . . a small stream entering into the head of the Gulf and having its sources not far from the Southerly shore of Lake Nicaragua."[25]

The northern boundary of the district was the lake and (according to Costa Rica) the La Flor River, though Rives did not need to decide that. Nor did he need to decide what line joined the source of the Rio del Salto with "the mouth of the San Juan River at the port of San Juan del Norte", but he did say that he had "no reason for thinking that it should have been a straight line"[26], let alone a straight line shown by Professor Brownlie.

23. (Tab 54) What is clear is that Nicoya could not have extended to the mouth of the Colorado River as Nicaragua portrays it. "The District of Nicoya lies on the Pacific side of the Continent", as Rives said; and even when Nicoya was part of the Captaincy-General of Guatemala, maps showed its boundary extending north from the Rio del Salto to the lake. An example is in

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[23] www.asamblea.gob.ni/opciones/constituciones/1824-11-22.doc; First Rives Report, CMN, Complete Annexes, Ann. 70, p. 4.

[24] First Rives Report, CMN, Complete Annexes, Ann. 70, p. 5.

[25] *Ibid.*, p. 3.

[26] *Ibid.*, p. 6.

tab 54 in your folders[27]. Quite independently of Nicoya, the northern boundary of Costa Rica ran along the Desaguadero, as stated in the 1573 Royal Charter[28].

24. Professor Brownlie asserted once more that "the San Juan de Nicaragua River belonged exclusively to the Province of Nicaragua from 1573"[29]. That is not the case. Formally Nicaragua did not gain a territorial claim on the Caribbean coast until 1745 and even then it was occupied by the Moskito Indians under a British protectorate that did not end until 1860. In 1858 Nicaragua did not have possession of the port of San Juan del Norte. This is mentioned in Article 5 of the Treaty of Limits.

25. In the event, Rives concluded that the 1838 Constitution of Nicaragua "did not definitely fix the boundaries of the State"[30], and that the 1858 Treaty was "a mere treaty of limits, settling disputed boundaries, and not one involving a cession of territory and an amendment to the Constitution"[31]. It followed that the Treaty of Limits was valid — a conclusion upheld by President Cleveland and part of the *res judicata* in this case.

26. Thus in 1858 Nicaragua abandoned its claim to Nicoya, but it got the area south of the La Flor River, a strip along the southern shore of the lake, giving it complete control of the lake for the first time, as well as the whole course of the San Juan River. This was not an unequal settlement.

(c) *The true object and purpose of the Treaty of Limits*

27. That brings me to the third point — the object and purpose of the Treaty of Limits. Professor Brownlie, consistently with the Nicoya thesis, treated it as entirely about territorial sovereignty.

28. But that is to ignore the elephant in the room. The elephant in the room — the obvious purpose of the Treaty — was the interoceanic canal. This was why the common defence of the common bays at each end of the proposed route of the canal was necessary, and the

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[27] See http://books.google.nl/books?id=iACOaiasV1oC&printsec=frontcover&dq=rio+san+juan+clotilde+obregon&hl=fr

[28] Royal Charter to Diego de Artieda, CMN, Ann. 86.

[29] CR 2009/5, p. 25, para. 29.

[30] First Rives Report, CMN, Complete Annexes, Ann. 70, p. 12, para. 29.

[31] *Ibid.*, p. 11.

demilitarization along that route effected by Article IX. This was why the completely new boundary south of the lake was so important. This is why the boundary of the two States lay along the left bank of the San Juan. And this is why the *quid pro quo* of freedom of navigation on the common course of the river was given: it was the only highway in the region — it still is — and if sovereignty over the highway belonged to one State, a broad right of use was in the very same article in the "pero" clause conceded to the other.

29. (Tab 55) George Rives understood the situation perfectly well when, in response to the tenth question of doubtful interpretation, he defined the "natural rights" of Costa Rica referred to in Article VIII. Article VIII defined Costa Rica's *droit de regard* in relation to a future canal: if Costa Rica's "natural rights" were not affected by the canalization project, its vote was only advisory. You will see on your screen, and in your folders, how Rives defined those natural rights. And the crucial phrase is at the end. The natural rights of Costa Rica are those rights which *inter alia* she owns: "in that part of the delta of the River San Juan which she owns or of the portion of the River itself in which she has perpetual rights of free navigation and other riparian rights"[32]. This is how Rives expressed the subject-matter of the Treaty of Limits from a Costa Rican point of view. Cleveland's Award was to the same effect, though he added the words "and perhaps other rights not here particularly specified"[33], an indication of the extensive approach to the interpretation of the Treaty of Limits which Cleveland took.

30. I stress: Costa Rica's natural rights according to Rives extended to "the portion of the River itself in which she has perpetual rights of free navigation and other riparian rights". It was not that the Treaty of Limits was not a territorial settlement — the view foisted on us by Professor Brownlie. It *was* a territorial settlement, but it entailed the river, and it did so on a perpetual basis. If ever there was a treaty establishing "obligations and rights . . . relating to the regime of a boundary" within the meaning of Article 12 of the 1978 Vienna Convention[34], this was it.

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[32] Second Rives Report, CMN, Complete Annexes, Ann. 71, p. 15.

[33] Cleveland Award, point 10: MCR Ann. 16, p. 99.

[34] Vienna Convention on Succession of States in respect of Treaties, 23 May 1978, 1946 *UNTS* 3, Art. 11 *(b)*.

C. The perpetual right of free navigation

31. I turn to what Rives was happy to call — *tout court* — Costa Rica's "perpetual rights of free navigation". Here I need to make three short points.

(a) *The right is permanent in character*

32. In another of its exercises in revisionism, Nicaragua suggests "that Costa Rica's rights of navigation would [not] necessarily be 'perpetual'". Professor McCaffrey stated these rights would effectively cease with the conversion of the river into a canal"[35]. Now this is a further hypothetical, like the large-scale dredging, and the Court does not need to pronounce on this issue any more than on dredging. But you will understand that the issue, having been raised by Nicaragua, requires a response. In fact the Treaty of Limits expressly provides for consultation with Costa Rica in respect of all future canalization schemes: it was Nicaragua's failure to comply with this obligation which led to the case before the Central American Court. I have referred already to Article VIII which provides that "if the [canal] transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory". I have already quoted Rives's conclusion on what these natural rights are, including the "perpetual rights of free navigation and other riparian rights". Rives added that where these natural rights were engaged "Costa Rica would have a right of veto, and, her assent being essential to the validity of the agreement, she would in effect become a party to any complete grant for inter-oceanic transit", though without being entitled to share in "the profits reserved for Nicaragua"[36]. President Cleveland answered the eleventh question accordingly[37]. So the Treaty of Limits provided for the eventuality of canalization, in a form which would preserve the reality of Costa Rica's "perpetual rights of free navigation and other riparian rights".

(b) *Even if Article VI referred to "articles of trade", these would be words of extension*

33. My second point concerns the dreaded "articles of trade" to which our colleagues say our freedom is limited. Professor Kohen will deal with the interpretation of the phrase "objetos de comercio". In what I say I am going to assume, *quod non*, that Nicaragua is right in interpreting

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[35] CR 2009/5, p. 29, para. 6 (McCaffrey).

[36] Rives Second Report, CMN, Complete Annexes, Ann. 71, p. 15 (response to point 11).

[37] Cleveland Award, point 11: MCR, Ann. 16, pp. 99-100.

this phrase as "articles of commerce". My point is that even if it means "articles of commerce" or "articles of trade" these are words of extension, not limitation.

34. Mr. President, Members of the Court, if I gave you a right to transit my river — a perpetual right of free navigation — and I later add the phrase "with articles of trade" I am not qualifying, limiting or reducing my grant — I am clarifying and extending it. We are talking about free navigation — amongst other things, free of taxes, imposts and charges including customs duties. I might grant a right of navigation to you but exclude the goods you are carrying. A very important aspect of the word "free" is the exemption from customs duties. Article VI extends that freedom even to goods landed on the opposite side of the river, and Article V gave Nicaraguan goods customs exemption at Punta de Castilla for as long as the then independent port of San Juan del Norte was not recovered and remained a "*free* port". The additional phrase "with articles of trade" is not there as a limitation of the right of free navigation; it makes it clear that the freedom extends to trade goods you may be carrying with you. The words are, quite simply, not words of limitation at all.

35. What would a right of free navigation with articles of trade look like — how would it work — if the phrase "articles of trade" involved a limitation or a restriction, as Nicaragua now contends? I would start off in the morning with my eggs for market, eggs produced by my riparian hens: obvious articles of trade. I would be free on the river — no visas, no taxes, no charges. I arrive with my eggs, intact I hope, at the busy local market of Sarapiquí and in a trice all my eggs are sold. But now I have no more eggs, no more articles of trade: *how do I get back to my hens*? In selling my articles of trade I have sold my freedom on the river for the day. I am stuck; I have to go to San José to get a visa, in the course of doing which I spend all the profits I have made from selling my eggs! This one-way freedom is no freedom at all — the freedom to leave the river with no right of return. And it is no answer for Mr. Reichler to say that riparians are exempt from visas[38]: that is a mere concession. Article VI makes no distinction between riparians and non-riparians.

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[38] CR 2009/4, p. 24, para. 43 (Reichler).

36. (Tab 56) Let me issue a formal challenge to colleagues opposite. Find me a treaty providing for freedom of navigation for persons if, and only if, they are carrying trade goods. This is what such a provision should look like: "but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, if and only it *[si y sólo si]* such navigation is with articles of trade . . ."[39] That is not what Article VI says. The Nicaraguan argument based on "articles of trade" is, with great respect, obvious nonsense.

(c) *Nicaragua's argument based on "articles of trade" is inconsequential*

37. But there is a further problem with Nicaragua's distinction between voyagers with and without trade goods — blankets and beads. It is entirely inconsequential in terms of the régime applied in practice. I confess, Ambassador Argüello, that I have been to the river: I went there without any articles of trade. But it made no difference whether I had articles of trade or not. No one *asked* if I was carrying articles of trade; no one checked the boat for safety, or for articles; we stopped, I paid, the boatman paid — though he was local —, we stopped repeatedly at army posts; no services were performed, no checks were carried out; we stopped, we paid, we stopped some more, eventually we left. We were wiser for the experience, no doubt — but poorer and completely unserviced by Nicaragua.

38. Again the point is a short one. The lawyer's argument based on "objetos de comercio" bears no relation to the actual régime of reporting, certification, payment, imposts, applied on the river. It is entirely inconsequential. Trade goods have nothing to do with it.

Outline of Costa Rica's reply

39. Mr. President, Members of the Court, this concludes my initial general remarks. With your permission, Mr. President, Professor Kohen will now deal in more detail with the interpretation of Article VI; Professor Caflisch will deal with the right of regulation and the individual Nicaraguan measures; I will return to discuss public navigation, related rights and remedies, and Ambassador Ugalde will conclude.

Mr. President, I would ask you now to call on Professor Kohen.

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[39] Spanish version: "pero la República de Costa Rica tendrá el derecho perpetuo de libre navegación en dichas aguas, entre la desembocadura de río indicada y el punto, a tres millas inglesas de distancia de Castillo Viejo, si y sólo si, esta navegación es con artículos de comercio . . ."

The PRESIDENT: Thank you, Professor Crawford, for your presentation. I now give the floor to Professor Marcelo Kohen.

M. KOHEN :

II. L'ARTICLE VI DU TRAITÉ DE LIMITES SE RÉFÈRE «AUX FINS DU COMMERCE»

1. Monsieur le président, Messieurs les juges, lors du premier tour de plaidoiries, la Partie adverse a maintenu son interprétation de l'expression «con objetos de comercio» comme signifiant uniquement «marchandises». Il est vrai que ses conseils ont suivi des pratiques différentes. Antonio Remiro, et par la suite Alain Pellet, ont préféré la formule «avec des objets de commerce». D'ailleurs, le premier a aussi employé «avec des choses faisant l'objet de commerce». Antonio Remiro a employé «avec des choses faisant l'objet d'activités commerciales»[40]. Certes, il a aussitôt affirmé que cela voulait dire, en bon français, «avec des marchandises»[41]. Paul Reichler et Steven McCaffrey ont, quant à eux, choisi de ne pas s'aventurer dans des traductions et ont employé directement l'espagnol tout au long de leurs exposés, et ceci alors même que Cleveland a utilisé l'expression «purposes of commerce»[42]. Ian Brownlie, pour sa part, après avoir cité correctement l'article VI du traité Cañas-Jerez a ajouté : «the words «for the purposes of commerce» are not accepted by Nicaragua as an accurate translation into English»[43]. M. Brownlie n'a pas pour autant indiqué depuis quand le Nicaragua refuse cette traduction et comment cet Etat l'a fait savoir.

2. Il doit être troublant pour une partie qui se présente devant votre Cour et qui conteste l'interprétation et la traduction d'un traité, de ne pas être capable de produire une version du traité allant dans son sens. D'autant plus que la Cour dispose de la seule version que la Partie a produite et qui exprime exactement le contraire de ce qu'elle prétend devant votre prétoire.

3. L'objet de mon exposé sera de réfuter les arguments avancés par le Nicaragua la semaine dernière relativement à l'expression controversée. Conformément à vos instructions, je ne

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[40] CR 2009/4, p. 36-37, par. 2, 5 et 6.

[41] CR 2009/4, p. 46, par. 42 (Brotóns).

[42] CR 2009/5, p. 9-12, par. 6, 9, 11, 13, 14 (Reichler) , CR 2009/5, p.28-31, par. 4, 5, 7, 8, 9 (McCaffrey).

[43] CR 2009/4, par. 19 (Brownlie).

reviendrai pas sur les questions que nous avons soulevées lors du premier tour et au sujet desquelles nos contradicteurs ont gardé un silence éloquent

4. Le plan de mon exposé est le suivant : *premièrement*, j'aborderai les arguments de la Partie adverse sur le sens des termes «con objetos de comercio» en général. *Deuxièmement*, la pertinence pour cette affaire de la traduction identique faite par les parties à l'occasion de l'arbitrage du président des Etats-Unis d'Amérique. *Troisièmement*, la conception très étroite que le Nicaragua adopte relativement à la notion de «comercio», démontrant que cette notion inclut le transport de passagers en général et de touristes en particulier. *Quatrièmement*, je me référerai à la pratique subséquente, qui confirme l'interprétation que nous avons faite de l'article VI du traité Cañas-Jerez. *Cinquièmement*, je viendrai sur les digressions temporelles d'Alain Pellet relatives à l'interprétation évolutive des traités.

A. L'interprétation du membre de phrase «con objetos de comercio»

5. Antonio Remiro nous a accusé d'avoir transformé — je cite — «l'acception courante et naturelle de l'expression *objetos de comercio*, à laquelle l'article VI du traité lie le droit de libre navigation, en un concept «finaliste», selon lequel *objets de commerce* ne représenterait pas des *choses*, des *marchandises*, mais des *fins*, des *objectifs* commerciaux»[44].

6. *Primo*, mon ami et contradicteur suppose bien rapidement et, ceci sans preuves à l'appui, qu'il n'existe qu'une seule acception courante et naturelle de l'expression «objetos de comercio» et que celle-ci est «marchandises». *Secundo*, nous n'avons pas transformé quoi que ce soit. Si quelqu'un a modifié ce qui a été l'interprétation communément acceptée, il s'agit bien du Nicaragua ! Monsieur le président, l'interprétation «finaliste», comme l'appelle Antonio Remiro, le Nicaragua l'a adoptée devant Cleveland en traduisant «for the purposes of commerce» et l'a même explicitée dans ses publications officielles de 1954 et 1974 en parlant de la navigation costa-ricienne «con fines de comercio y fiscales»[45]. Franchement, Monsieur le président, je ne comprends pas ce procès que nous fait la Partie adverse, alors qu'elle-même a indiqué dans son

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[44] CR 2009/4, p. 36, par. 3.

[45] Nicaragua, ministère des affaires étrangères, *Situación jurídica del Río San Juan*, Managua 1954, mémoire du Costa Rica (MCR), vol. 6, annexe 219 ; Nicaragua, ministère des affaires étrangères, *Situación jurídica del Río San Juan*, Managua, 1974, MCR, vol. 6, annexe 222. Dossier de plaidoiries, onglet n° 18.

contre-mémoire que, je cite, «the right of free navigation is articulated in the form of a careful statement of purposes»[46].

7. M. Argüello n'a pas apprécié que je soutienne qu'il a traduit à l'espagnol l'expression française «sous le rapport du commerce» de la manière suivante : «con fines comerciales»[47]. Il ne m'a pas contredit jeudi dernier, bien au contraire. Le distingué agent du Nicaragua vous a aussi donné sa traduction anglaise de «con fines comerciales», traduction qu'il a utilisée pour expliquer ce que «sous le rapport du commerce» veut dire en espagnol. Sans surprise, cela donne «for commercial purposes»[48]. Le tour est fait : voilà qu'il arrive à une variante équivalente de la traduction de «con objetos de comercio» en anglais à laquelle tout le monde adhérait avant la naissance de ce différend, y compris le Nicaragua!

a) *Le débat linguistique confirme l'interprétation costaricienne*

8. Antonio Remiro a prétendu que le rapport Moreno de Alba n'a pas apporté des preuves documentaires à l'appui de ses conclusions[49]. Mais chacun des commentaires de l'académicien hispano-américain est étayé par des références concrètes aux utilisations des termes examinés. De plus, un appendice est joint au rapport. C'est un rapport complet, concret, fouillé et pertinent.

9. Comme M. Seco, Antonio Remiro Brotóns a écarté d'un revers de la main tous les exemples du tableau n° 1 de la réplique du Costa Rica[50] dans lesquels le singulier «objeto» signifie «fin»[51]. Ce sont soixante-deux exemples, un nombre assez impressionnant en effet, face à une thèse qui affirme que le terme «objetos» au pluriel ne peut *jamais* signifier «fins»[52] ! Et ces exemples ne sont pas tirés de la littérature ou de journaux n'ayant aucun lien avec la situation : il

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[46] Contre-mémoire du Nicaragua (CMN), par. 2.1.51.

[47] Carlos J. Argüello Gomez, *Algunos aspectos jurídicos sobre el Tratado Jerez-Cañas y el Laudo Cleveland*, ministère des affaires étrangères, Managua, 26 août 1998. Disponible sur : http://www.joseacontreras.net/dirinter/america/Nicaragua_Rio_San_Juan.pdf (visité le 1er mars 2009). Jusqu'au 27 février 2009 aussi *in* : http://www.euram.com.ni/pverdes/articulos/aspectos_juridicos_rio_san_juan.htm. Dossier de plaidoiries, onglet n° 27.

[48] CR 2009/4, p. 12, par. 16 (Argüello).

[49] CR 2009/4, p. 39, par. 14 (Brotóns).

[50] Réplique du Costa Rica (RCR), tableau 1, «Use of the term «objetos» as meaning «purposes» in 19th Century documents», p. 99-126.

[51] RCR, tableau 1, documents, 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31.

[52] CMN, par. 4.1.27; DN, par. 3.12.

s'agit uniquement de l'emploi du terme «objeto» comme «fin», au singulier ou au pluriel, dans des traités et des contrats publics conclus au cours du XIX^{e} siècle par l'un ou l'autre des pays. Le rapport Moreno de Alba a expliqué pourquoi la prétention selon laquelle «objetos» au pluriel ne peut signifier «fins» n'est pas correcte. Je vous y renvoie[53].

10. Il restait tout de même dix-huit autres exemples d'utilisation du terme «objetos» (au pluriel) dans le sens de «fins». Le conseil nicaraguayen en a compté seize, mais le fait est que dans un seul et même texte le terme apparaît deux fois dans le sens de «fins». Peu importe. Le professeur Remiro essaye d'écarter une dizaine de cas sous prétexte que le terme «objetos» (au pluriel) apparaît seul[54]. Est-ce là une bonne raison ? Le Nicaragua ne nous avaient-il pas dit que «objetos» au pluriel ne voulait *jamais* dire «fins» ?[55]

11. Le conseil nicaraguayen pense que, au vu des cas mentionnés dans le «Corpus diachronique de l'espagnol» dans lesquels l'expression «objetos de comercio» est employée comme — je le cite — «choses faisant l'objet d'activités commerciales», la seule signification possible de l'expression «con objetos de comercio» à l'article VI est «marchandises»[56]. Je remarque que dans aucun de ces cas l'expression est précédée de la préposition «con», tel qu'elle figure à l'article VI. Le conseil de la Partie adverse oublie trop vite l'importance du contexte afin de déterminer le sens des termes qui comportent plusieurs significations. Son expert l'a affirmé et le professeur Remiro l'a lui-même cité[57]. C'est vrai que M. Seco ne dit pas ce qu'il fait, mais cela est une tout autre question.

12. Pour trouver une analyse sémantique et — syntactique, il faut se référer au rapport de M. Moreno de Alba. Il procède à l'exercice suivant. Allégé de tous les éléments non nécessaires à l'analyse en question, la phrase se résume à ce qui suit : «La République du Costa Rica aura ... un droit ... de libre navigation ... aux fins du commerce ... avec le Nicaragua...» Il montre que le seul sens que le syntagme «con objetos de comercio» peut revêtir est «aux fins du commerce». En effet, si on lit «con objetos de comercio» comme signifiant «marchandises», le résultat auquel on

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[53] Documents annexés à la lettre de l'agent du Costa Rica du 27 novembre 2008, annexe I, III.

[54] CR 2009/4, p. 40, par. 18 (Brotóns).

[55] CMN, par. 4.1.27, duplique du Nicaragua (DN), par. 3.12.

[56] CR 2009/4, p. 39-40, par. 15.

[57] CR 2009/4, p. 37-38, par. 8.

parvient est un non-sens, aussi bien par rapport au terme «navigation» que par rapport au syntagme «avec le Nicaragua». Relativement au premier de ces termes, cela fonctionnerait comme un complément, qui signifierait «navigation accompagnée de marchandises» ou «navigation en cohabitation avec de marchandises» ou «navigation au moyen de marchandises». En ce qui concerne le second groupe de mots, cela donnerait la phrase suivante : «La République du Costa Rica aura ... un droit ... de libre navigation ... avec des marchandises ... avec le Nicaragua». Et M. Moreno de Alba de conclure : «Navigation avec le Nicaragua ? Des marchandises avec le Nicaragua ? Impossible. Il s'agit là encore d'une ineptie car, dans la reformulation, le nom *commerce* perd son sens *déverbal* (issu d'un verbe) et donc, laisse le syntagme *avec le Nicaragua* sans aucun lien sémantique ni syntactique[58].

b) *Les traités d'amitié, de commerce et de navigation conclus par les parties à la même époque que le traité Cañas-Jerez*

13. L'analyse linguistique se voit d'ailleurs confirmée par la pratique précédente ou contemporaine à la conclusion du traité Cañas-Jerez. Je voudrais me servir d'exemples non seulement intéressants du point de vue linguistique, mais aussi et surtout juridique. Car ce sont des traités conclus par les deux Parties. Et pas n'importe quels traités, puisqu'il s'agit de traités qui concernent deux termes qui sont essentiels à l'interprétation de l'article VI du traité de 1858 : «navigation» et «commerce».

14. Mon ami Antonio Remiro s'est référé aux traités de commerce et de navigation qui, depuis le traité Jay utilisent l'expression «para los objetos de su comercio» en espagnol et «for the purposes of their commerce» en anglais. Au sujet des Parties à cette affaire, il a cité le traité d'amitié, de commerce et de navigation Costa Rica/Etats-Unis (Molina-Webster) de 1851, et les trois traités d'amitié, de commerce et de navigation Etats-Unis/Nicaragua de 1857 (Cass-Irrisari), de 1859 (Lamar-Zeledón) et de 1867 (Ayon-Dickinson)[59].

15. Voici à l'écran un exemple de la formule type employée dans tous ces traités, l'article II du traité Cass-Irrisari de 1857, dans ses versions espagnole et anglaise, également authentiques[60].

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[58] Documents annexés à la lettre de l'agent du Costa Rica du 27 novembre 2008, annexe I, VIII.2.

[59] CR 2009/4, p. 41, par. 21 (Brotóns).

[60] Dossier de plaidoiries, onglet n° 58.

Le conseil du Nicaragua ne s'est pas donné la peine d'appliquer sa théorie linguistique à l'expression «para los objetos de su comercio». Manifestement, traduire «para los objetos de su comercio» en français en disant «pour les objets de son commerce» et prétendre ensuite que cela signifie «pour les marchandises» aurait dépassé les limites de la témérité. Il a pourtant conclu avec beaucoup de courage que ces traités ne prouvent pas que le terme «objetos» signifie «fins»[61].

16. Le conseil nicaraguayen, contrairement à ses habitudes, du moins dans cette affaire, se livre à un exercice qu'il aurait pu appeler «finaliste», pour justifier son interprétation selon laquelle, «para los objetos de su comercio» veut dire des marchandises et uniquement des marchandises. Il nous dit : «Leur commerce porte évidemment sur les marchandises qu'ils achètent et qu'ils vendent et logiquement qu'ils entreposent et emmagasinent dans des bâtiments et des entrepôts»[62]. Je me pose les questions suivantes : comment viennent-ils, les citoyens qui, selon les termes de ces traités, ont le droit d'arriver sur le territoire de l'autre partie ? Ont-ils le droit de venir, au regard de l'interprétation nicaraguayenne, «sans articles de commerce» ? Je peux croire que la fonction d'un entrepôt est en effet d'emmagasiner des marchandises, mais ce n'est pas celle d'une maison. Le professeur Remiro pourra-t-il m'expliquer quel type de marchandise l'*Accessory Transit Company* de Cornelius Vanderbilt achetait et vendait lorsqu' à l'époque elle commerçait sur le fleuve San Juan, transportant environs 68 000 passagers entre 1848 et 1869[63] ?

17. Par ailleurs, la thèse du professeur Remiro doit faire face à un problème insurmontable. Le texte authentique anglais de ces traités utilise la formule «for the purposes of their commerce». Comme il est établi au paragraphe 3 de l'article 33 de la convention de Vienne sur le droit des traités, «[l]es termes d'un traité sont présumés avoir le même sens dans les divers textes authentiques»[64]. Aucun doute n'est donc possible : «*objetos*» et «*purposes*» ont le même sens. «Objetos de comercio» et «objetos de su comercio» ont été traduits à la même époque par «purposes of commerce» et «purposes of their commerce». Je pense qu'il ne vaut plus la peine de

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[61] CR 2009/4, p. 42, par. 26 (Brotóns).

[62] CR 2009/4, p. 42, par. 25 (Brotóns).

[63] http://en.wikipedia.org/wiki/Accessory_Transit_Company ; http://www.bruceruiz.net/PanamaHistory/argonauts.htm (visités le 8 mars 2009)

[64] «The terms of the treaty are presumed to have the same meaning in each authentic text» Cf., *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1062, par. 25.

s'appesantir sur le point de savoir si «*objetos*» au pluriel peut indiquer ou non «fins» lorsque ce terme est associé à celui de «comercio». A ce stade, la réponse va de soi.

c) *Les traités de l'époque utilisaient d'autres expressions pour se référer aux marchandises*

18. Je passe maintenant à la pratique de l'époque pour désigner des marchandises. M. Remiro s'est seulement contenté de voir dans le tableau n° 2 de la réplique du Costa Rica la preuve de la richesse de notre langue commune[65]. Dommage qu'il ne s'y soit pas arrêté un peu plus en détails. Parce qu'il n'existe pas un seul texte qui emploie l'expression *objetos de comercio* pour définir des marchandises.

19. En effet que découvrons-nous ? Que sur 218 cas cités, 43 emploient «articulos», suivis ou non d'une qualification, 32 «mercancías», 19 «mercaderías», 26 «efectos», 28 «productos», 16 «manufacturas», 13 «géneros/jéneros» et 13 «objetos», dans un contexte sans équivoque possible. Il y a encore d'autres expressions employées[66].

20. Le conseil du Nicaragua aurait pu apprécier que lorsqu'on voulait évoquer des marchandises, on utilisait des expressions dépourvues d'ambiguïté. Il aurait aussi pu constater — puisqu'il a été longuement question du transport du café dans les plaidoiries de la Partie nicaraguayenne —, que quand on voulait se référer concrètement à des articles d'importation ou d'exportation, on le faisait explicitement[67], de même que lorsqu'on voulait parler des articles naturels ou de production nationale[68]. L'article VI du traité Cañas-Jerez se trouve loin, très loin, de l'une et de l'autre de ces hypothèses.

d) *L'approche du Costa Rica devant Cleveland mène à une interprétation de l'article VI qui va bien au-delà du transport de marchandises*

21. Alain Pellet et Steven McCaffrey ont cru trouver un argument en faveur de l'interprétation nicaraguayenne dans un passage de la plaidoirie du Costa Rica devant Cleveland[69], en lui faisant dire ce qu'il ne dit pas et en oubliant en passant de mentionner la réponse du

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[65] CR 2009/4, p. 43, par. 27 (Brotóns).

[66] RCR, p. 127-151.

[67] RCR, tableau n° 2, documents n° 1, 2, 3, 5, 8, 9, 11, 12, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26.

[68] RCR, tableau n° 2, documents n° 5, 9, 10, 15, 22.

[69] CR 2009/4, p. 58-59, par. 20-21 (Pellet) ; CR 2009/5, p. 31-32, par. 13 (McCaffrey).

Costa Rica. Il s'agit d'un passage qui pose une question rhétorique d'ordre général traitant de l'étendue du droit de libre navigation découlant de l'article VI[70]. Vous voyez à l'écran la réponse complète, que vous avez aussi dans vos dossiers à l'onglet n° 59. Je cite quelques extraits importants relativement à notre question :

> «La réponse semble être très simple ... Il semble être indiscutable que le Costa Rica peut naviguer sur le San Juan avec des bateaux publics qui ne sont pas des vrais navires de guerre ... Le sens de l'expression «navigation commerciale» inclut nécessairement la police douanière, l'acheminement du courrier ainsi que tout autre service public de même nature»[71].

22. La réponse du Costa Rica à sa propre question rhétorique est donc dépourvue de toute ambiguïté. Elle est bien évidemment négative. Il est simplement impossible de déduire de ce texte que pour le Costa Rica «objetos de comercio» voulait dire «marchandises» ou que la seule «fin du commerce» équivalait au transport de marchandises. Bien au contraire. «Navigation commerciale» et non pas «navigation avec des marchandises», voilà comment le Costa Rica interprétait l'expression «navegación con objetos de comercio» à cette époque.

e) *Si le Nicaragua avait des doutes au sujet de la traduction présentée à Cleveland, il aurait mis les mots équivalents espagnols entre parenthèses*

23. Voyons maintenant ce qu'il en a été du côté du Nicaragua. Dans la traduction du traité de 1858 produite par cet Etat et présentée au président Cleveland, les mots originaux en espagnol apparaissent entre parenthèses lorsque le Nicaragua a considéré que la traduction exigeait une clarification. Vous voyez à l'écran l'article VI tel que présenté par le Nicaragua à l'arbitre. Comme vous pouvez l'observer à l'onglet n° 60 de vos dossiers, la Partie adverse a recouru à cette clarification à quatre reprises, pour les mots ou expressions «atracar», «canalización», «este voto será consultivo» et «crédito activo» respectivement aux articles VI, VII, VIII et XI. Sans surprise, le Nicaragua n'a pas trouvé nécessaire d'insérer entre parenthèses «con objetos de comercio» au regard de sa traduction «for the purposes of commerce».

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[70] MCR, vol. 6, annexe 207, p. 831 [p. 155].

[71] *[Traduction du Greffe.]* Texte anglais original: «The answer seems to be very simple ... It seems to be beyond discussion that Costa Rica can navigate in the San Juan river with public vessels, which are not properly men-of-war. Within the meaning of the words, commercial navigation, both the revenue police, the carrying of the mails, and all other public services of the same kind are necessarily included». *Ibid.*, p. 831-832 [p. 155-156]. Dossier de plaidoiries, onglet n° 59.

f) *La sentence Cleveland devient illisible si l'on suit l'interprétation nicaraguayenne*

24. Dans sa plaidoirie du 5 mars, Alain Pellet a semblé semer la confusion en lisant la sentence Cleveland et —en passant— a fait preuve d'une d'imagination débordante en m'attribuant des propos que je n'ai pas tenus relativement à la sentence[72]. Mon contradicteur et cher ami affirme de manière des plus légères : «Comme l'a relevé le professeur Kohen, cette phrase ne fait pas grand sens en français, que l'on traduise «con objetos de comercio» par «avec des marchandises» ou «à des fins commerciales»»[73]. La réalité est que, après avoir lu la sentence dans la partie qui utilise l'expression «purposes of commerce», j'avais affirmé que «[l]a lecture nicaraguayenne aboutirait au résultat absurde de l'exercice d'un droit d'usage du fleuve aux «articles de commerce»»[74]. Donc, seule une lecture conforme *à l'approche du Nicaragua* serait absurde. De plus, Monsieur le président, dans la sentence Cleveland, rien n'est à traduire de l'espagnol parce que l'arbitre rend sa sentence en anglais et utilise «purposes of commerce» dans le passage en question. Ceci fait beaucoup de sens, aussi bien en anglais que dans la traduction en français du Greffe par ailleurs.

25. Les choses ne se sont pas arrêtées là. Il s'agissait sans doute d'un moment de fébrilité. Alain Pellet a ensuite décidé de se plonger dans des eaux troubles et très agitées, bien plus agitées que celles du San Juan. Il a lancé une attaque contre la sentence Cleveland, affirmant que la référence faite à la jouissance des «fins du commerce» n'était peut-être qu'«une simple inadvertance de l'arbitre», ou que ce dernier, et je cite mon ami,

> «a préféré ne pas se lancer dans une interprétation de l'expression «con objetos de comercio» (traduite par «for purposes of commerce» par les Parties) et a délibérément choisi de recourir aux guillemets, afin de signifier qu'il utilisait cette expression sans se prononcer sur un problème d'interprétation que les Parties ne lui avaient pas soumis et sur lequel elles ne s'étaient pas exprimées»[75].

26. Alain Pellet nous démontre ici toute l'étendue de son imagination. Bien sûr, je comprends que l'article 2 de la sentence Cleveland mette le Nicaragua dans une situation très embarrassante. Les guillemets s'expliquent tout simplement par le fait que Cleveland était en train

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[72] CR 2009/4, p. 59, par. 21 (Pellet).

[73] CR 2009/4, p. 59, par. 21 (Pellet) ; note de bas de page omise.

[74] CR 2009/2, p. 64, par. 58 (Kohen).

[75] CR 2009/4, p. 59, par. 21 (Pellet).

de citer les termes de l'article VI tels que traduits par les deux Parties[76]. Alain Pellet crée par ailleurs «un problème d'interprétation» qu'il sait inexistant, puisqu'il avait affirmé auparavant qu'il n'y avait pas de désaccord entre les Parties sur le sens et la portée de l'article VI[77].

27. Le texte de l'article 2 de la sentence est clair et dépourvu d'ambiguïté : «l'exercice du droit d'usage de ce fleuve «aux fins du commerce» que lui reconnaît ledit article», ceci fait pleinement sens ; «l'exercice du droit d'usage de ce fleuve «avec des marchandises» que lui reconnaît ledit article ne fait pas sens du tout.

g) *La première sentence Alexander : une approche large du commerce*

28. Alain Pellet a également cru pouvoir trouver dans la première sentence arbitrale, rendue par l'ingénieur Alexander, un appui à la thèse nicaraguayenne. Dans cette sentence, l'arbitre indique que, «throughout the treaty, the river is treated and regarded as an outlet of commerce»[78]. Aux yeux de mon éminent contradicteur, cette expression «vise clairement le commerce «avec des marchandises»»[79]. A mon avis, cette affirmation rejoint plutôt l'interprétation costa-ricienne. Alexander utilise «commerce» et non «trade» et, comme le Nicaragua l'a affirmé devant la Cour, en anglais «commerce» est un concept plus large que «trade», et va au-delà de l'achat et la vente de marchandises[80]. Cela inclut donc les diverses acceptions, y compris le transport des personnes.

B. La traduction identique des parties devant Cleveland entraîne des conséquences juridiques

29. Je passe maintenant aux conséquences juridiques de la traduction identique des parties devant Cleveland. A en croire Antonio Remiro, «le Costa Rica prétend remplacer l'interprétation du seul texte authentique rédigé en espagnol par l'interprétation d'une traduction anglaise faite à l'occasion de l'arbitrage Cleveland qu'il considère mieux adaptée à ses prétentions»[81]. Pas du tout, Monsieur le président. Nous ne prétendons pas remplacer quoi que ce soit.

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[76] RCR, par. 3.66-3.68.

[77] CR 2009/4, p. 57, par. 19 (Pellet).

[78] Sentence arbitrale n° 1, 30 septembre 1897, *Pasicrisie Internationale 1794-1900* (Berne : Stampfli,1902, réimpr. par P.-M. Eisemmann, La Haye : M. Nijhoff, La Haye, 1997), p. 531, MCR, vol. 2, annexe 18. MCR, par. 4.24. Traduction : «partout dans le traité, le fleuve est considéré comme un débouché pour le commerce».

[79] CR 2009/4, p. 60, par. 22 (Pellet).

[80] *Memorial of Nicaragua (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua*, vol. I, p. 403-404.

[81] CR 2009/4, p. 40, par. 16 (Brotóns).

30. Il va de soi que le texte du traité est en espagnol. Nous soutenons simplement que les deux Parties ont traduit l'article VI de la même manière : «for the purposes of commerce».

31. Le professeur Pellet me concède qu'il n'existait pas de désaccord entre les Parties au sujet de l'interprétation des termes «con objetos de comercio» devant Cleveland. Mais il ajoute qu'«il n'y a eu aucun accord pour l'excellente raison qu'il n'y avait aucun désaccord.»[82]. Franchement, j'ai un peu de mal à suivre le raisonnement de mon collègue. Apparemment, pour Alain Pellet, pour que deux Etats se mettent d'accord sur quelque chose, il faut nécessairement qu'ils aient été auparavant en désaccord. C'est une étrange manière de concevoir les relations internationales. Non, Monsieur le président. Les Etats se mettent heureusement d'accord sur beaucoup de questions dans le but de poursuivre des fins communes, sans qu'il soit obligatoire qu'il y ait préalablement des différends ou des divergences relativement aux objets de ces accords.

32. Allons un peu plus loin sur la question concrète qui nous occupe : l'attitude des parties devant Cleveland. Il n'y avait pas de désaccord sur la portée de l'expression «con objetos de comercio». Personne n'a soulevé de point d'interprétation douteuse, C'est tout ? Non, ce n'est pas tout. Sur quoi portait l'accord devant Cleveland ? Sur la façon de traduire cette expression en anglais.

33. J'avais constaté lundi dernier que les deux parties ont traduit la phrase présentement controversée exactement de la même manière, pas un iota de différence[83]. Alain Pellet l'a reconnu[84]. Pour moi, cela démontre non seulement qu'il n'y avait pas de désaccord, mais aussi que les parties étaient d'accord sur la façon de traduire «con objetos de comercio» en anglais.

34. Monsieur le président, toute traduction a une signification. Il s'agit de la manière d'exprimer une idée dans une autre langue. Alain Pellet ne veut tirer aucune conclusion de cette remarquable coïncidence intervenue devant l'arbitre appelé à trancher toute question d'interprétation douteuse du traité. Pour notre part, nous tirons celle qui s'impose.

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[82] CR 2009/4, p. 57, par. 19 (Pellet).

[83] CR 2009/2, p. 50, par. 9 (Kohen).

[84] CR 2009/4, p. 57, par. 19 (Pellet).

35. Et à ce stade avancé de la procédure je me permets le commentaire suivant : j'ai attendu en vain que la Partie adverse nous explique pourquoi le Nicaragua a traduit «con objetos de comercio» en 1887 de la manière qu'il rejette avec véhémence aujourd'hui.

C. Le terme «comercio» ne se limite pas à l'achat et à la vente de marchandises

36. Le Nicaragua a déployé beaucoup d'efforts pour constater une évidence : à savoir que le transport de marchandises tombe sous le coup de la navigation aux fins du commerce[85]. Contrairement à ce que nos adversaires et amis affirment[86], le Costa Rica n'a aucune difficulté à accepter la première acception du terme «commerce». Nous sommes même prêts à reconnaître que l'achat et la vente de marchandises constitue l'activité commerciale la plus emblématique. Mais ce n'est pas la seule ! Ni au XIX^{e} siècle, ni aujourd'hui.

37. Par contre, mes collègues Remiro et McCaffrey ont beaucoup de difficultés avec la seconde acception du terme commerce, celle signifiant communication[87]. Nous avons cité cette acception dès notre mémoire[88] et le Nicaragua ne s'y est jamais référé durant la phase écrite !

38. Aux annexes 59 et 60 de la duplique, le Nicaragua a présenté l'entrée «comercio» contenue dans deux dictionnaires bilingues anglais-espagnol, l'un datant de 1809, l'autre de 1858.

Vous les voyez à l'écran. Il est question non seulement de «commerce» and «trade», mais aussi de «communication», et ceci au regard des deux dictionnaires.

39. Au fond, Messieurs les juges, votre Cour a déjà examiné en détail la portée du mot «commerce» dans l'affaire des *Plates-formes pétrolières*[89]. Je n'oserais pas abuser de votre patience en vous rappelant cette analyse exhaustive qui s'avère pertinente pour les besoins de cette affaire et dont vous trouverez un extrait à l'onglet n° 61 de vos dossiers.

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[85] *Ibid.*, p. 43- 46, par. 28-42 (Brotóns).

[86] *Ibid.*, p. 44, par. 34 (Brotóns).

[87] *Ibid.*, p. 44-45, par. 33-35 (Brotóns) ; CR 2009/5, p. 29-30, par. 7 (McCaffrey).

[88] MCR, par. 4:52-4.72.

[89] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 818-819, par. 45-46, 48-49. Dossier de plaidoiries, onglet n° 61.

a) *La navigation commerciale inclut le transport des passagers*

40. Le conseil du Nicaragua a affirmé en ne s'appuyant sur aucune référence concrète que «[t]ous les documents diplomatiques et les traités avortés antérieurs au traité Jerez-Cañas rapportent la navigation sur le fleuve San Juan au transport de fruits, de produits, de marchandises, notamment de café»[90]. Ceci est faux et je vous renvoie à nos plaidoiries qui traitent de ces questions[91].

41. Nous avons fourni la preuve démontrant que le transport de passagers est compris dans le droit costa-ricien de libre navigation découlant de l'article VI du traité Cañas-Jerez et je n'y reviendrai pas[92].

42. Le silence du Nicaragua, en particulier par rapport aux traités qu'il a conclus en 1857 avec les Etats-Unis, en 1859 avec la France et en 1860 avec la Grande-Bretagne, est assourdissant. Tous trois se réfèrent explicitement au San Juan, au Costa Rica et à la navigation avec des personnes et des marchandises, aussi bien du gouvernement que des citoyens[93]. Même en adoptant la lecture la plus favorable au Nicaragua, ces trois traités sonnent le glas de l'interprétation nicaraguayenne de l'article VI qui limite ce dernier exclusivement au transport de marchandises et aux navires privés.

43. J'ajouterai que l'interprétation nicaraguayenne excluant les passagers aboutit à un résultat absurde et déraisonnable. Imaginons un producteur du café costa-ricien du XIX^e^ siècle. S'il voulait aller en Europe pour promouvoir et vendre son café, il devrait partir par le Pacifique et faire le tour du cap Horn. Une fois revenu au Costa Rica avec son carnet de commandes par la même route, il pourrait toutefois envoyer son café par le San Juan. Et s'il partait avec sa cargaison de café en Europe par le San Juan, il devrait rentrer en faisant le tour du cap Horn car il rentrerait «sans articles de commerce» ! Peut-on sérieusement imaginer un instant que telle était la perception des négociateurs du traité Cañas-Jerez ?

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[90] CR 2009/4, p. 47, par. 48 (Brotóns).

[91] RCR, par. 2.53-2.54 ; CR 2009/2, p. 66-67, par. 64-68 (Kohen).

[92] MCR, par. 4.58-4.72 ; RCR, par. 3.76-3.78.

[93] United States-Nicaragua Treaty of Friendship, Commerce and Navigation, 16 novembre 1857, RCR, vol. 2, annexe 10 (article XX, dossier de plaidoiries, onglet n° 30) ; traité d'amitié, de commerce et de navigation conclu le 11 avril 1859 entre la France et le Nicaragua, RCR, vol. 2, annexe 14 (article XXXIII, dossier de plaidoiries, onglet n° 28) ; Treaty of Friendship, Commerce and Navigation between Great Britain and Nicaragua, 11 février 1860, RCR, vol. 2, annexe 15 (article XXVI, dossier de plaidoiries, onglet n° 29).

b) *Le transport de touristes tombe sous le coup de l'article VI du traité de 1858*

44. Alain Pellet est allé jusqu'à invoquer que le droit de libre navigation ne pourrait inclure le transport de touristes pour la simple raison que le tourisme n'avait pas l'importance économique qu'il a aujourd'hui et qu'il aurait été, à l'en croire, sans rapport aucun avec le commerce à l'époque de la conclusion du traité[94].

45. Il ne fait aucun doute que le tourisme existait à l'époque de la conclusion du traité Cañas-Jerez, certes pas avec la dimension qu'il a aujourd'hui. Alain Pellet a soigneusement évité d'affirmer le contraire[95].

46. En effet, de nombreux éléments témoignent de l'existence de cette activité. Il est intéressant de relever que le premier emploi que l'on trouve du mot «turista» en espagnol fait référence à un adjectif qualifiant une activité précise — l'excursion —, et qui, de plus, date de la décennie précédant le traité Cañas-Jerez[96]. Mark Twain a sans doute été le voyageur le plus célèbre qui a navigué sur les eaux du San Juan peu après la conclusion du traité, en 1863[97].

47. «Le tourisme — c'est-à-dire le voyage d'agrément — est apparu à la fin du XVII^e siècle en Angleterre», nous dit un auteur qui explique que cette activité est passée d'un luxe de riches à un loisir de masse[98]. Même à l'époque où il était exclusivement réservé aux riches, le tourisme exigeait une organisation : en effet, il fallait se déplacer, naviguer, acheter de la nourriture et autres «marchandises» — l'obsession de nos contradicteurs — et se loger ailleurs : tous ces agissements, Monsieur le président, n'englobent-ils pas des activités commerciales ? En fait, je m'étonne de la position élitiste prise par Alain Pellet. Apparemment, si c'était l'œuvre d'une poignée de riches, il serait prêt à l'admettre pour le San Juan, mais non lorsqu'il s'agit d'une activité ouverte à une large partie de la population.

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[94] CR 2009/4, p. 53, par. 9 (Pellet).

[95] *Ibid.*, p. 53-54, par. 9-10 (Pellet).

[96] Juan Valera, *Correspondencia 1847-1857*. Disponible dans : http://corpus.rae.es/cordenet.htm (visité le 8 mars 2009).

[97] http://www.maritimeheritage.org/vips/marktwain.html (visité le 8 mars 2009).

[98] Stéphane Lecler, «Une histoire du tourisme. D'un luxe de riches à un loisir de masse» dans *Alternatives Economiques* — n° 271 — juillet 2008 (http://www.alternatives-economiques.fr/une-histoire-du-tourisme-d_un-luxe-de-riches-a-un-loisir-de-masse_fr_art_735_38022.html) (visité le 8 mars 2009).

48. Je ferai un bref commentaire sur l'interprétation de l'affaire *Kasikili/Sedudu* faite par mon contradicteur. Dans le communiqué de Kasane du 24 mai 1992, qu'il a cité[99], les présidents des deux pays ont noté que «la navigation devait *rester* sans entrave et, entre autres, les touristes devaient pouvoir se déplacer librement» (*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1107, par. 102 ; les italiques sont de nous). «Rester» : c'est là la manifestation du maintien de quelque chose qui existe déjà, et non celle d'un accord constitutif. Or, aucun texte conventionnel n'attribuait un droit spécifique lié à la navigation touristique. J'insiste : l'intérêt essentiel de l'arrêt *Kasikili/Sedudu* est celui de l'interprétation de la liberté de navigation comme incluant la navigation touristique.

49. Au fond, Monsieur le président, la question fondamentale n'est pas celle de savoir si le tourisme existait ou non à l'époque de la conclusion du traité Cañas-Jerez, mais si des gens qui se dirigent d'un point à un autre du territoire costa-ricien devraient être exclus du bénéfice de la notion de libre navigation à des fins du commerce, pour la seule raison qu'ils sont des touristes.

50. Ces touristes vont d'un point du territoire costa-ricien à un autre : de Sarapiquí à Tortuguero notamment. Les touristes sont aussi des passagers. Et ils sont en transit. Va-t-on demander à chaque passager se trouvant sur des bateaux costa-riciens s'il ou elle voyage par loisir ou pour d'autres raisons, en vue de savoir s'il peut ou non bénéficier du droit de libre navigation aux fins du commerce ?

D. La pratique subséquente existe et confirme l'interprétation costa-ricienne

51. Alain Pellet s'est employé à minimiser la portée de la pratique suivie par les parties dans l'application du traité, allant même jusqu'à en nier purement et simplement l'existence[100]. Je lui répondrai qu'il existe un faisceau très large d'éléments de la pratique, qui inclut non seulement les bateaux, les marchandises, les bateliers, les passagers et les agents publics, mais aussi les traités et les prises de position des parties. Ces vrai que c'est plus facile de nier l'existence de la pratique que de répondre aux exemples concrets de cette pratique que nous avons donnés[101]. Cela ne facilite pas pour autant la situation procédurale du Nicaragua.

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[99] CR 2009/4, p. 5, par. 12 (Pellet).

[100] *Ibid.*, p. 55-62, par. 13-26 (Pellet).

[101] CR 2009/2, p. 61-63, par. 49-55 (Kohen) ; CR 2009/3, p. 36, par. 9 (Kohen).

52. Je vais ajouter d'autres références relatives aux deux décennies qui ont précédé la naissance du différend. Le Costa Rica a présenté la preuve que son droit a davantage été exercé pour le transport de personnes (privées ou fonctionnaires publics) que pour celui des marchandises, sans que le Nicaragua n'ait manifesté la moindre opposition, sauf à partir de la naissance de ce différend[102]. Il s'agit, pour reprendre les termes du professeur Pellet, de «la pratique ouverte et constante de l'une des parties» qui «ne se heurte pas à une objection de la part de l'autre»[103].

53. Des déclarations sous serment de certains professionnels du transport et autres individus démontrent que le transport des touristes était pratiqué depuis les années 1970[104]. Une déclaration sous serment d'un fonctionnaire militaire nicaraguayen confirme qu'il en était ainsi[105].

E. Les contradictions nicaraguayennes sur l'interprétation évolutive

54. Alain Pellet nous a invités à discuter de l'interprétation évolutive des traités[106]. La Partie défenderesse est consciente de la faiblesse de son interprétation relative à l'article VI et cherche à minimiser la portée de l'étendue des fins de commerce auxquelles l'article se réfère.

55. Le raisonnement adopté par le conseil nicaraguayen comporte plusieurs lacunes. S'il rappelle que le critère ultime pour trancher le problème de l'interprétation évolutive est l'intention des parties[107], il ne développe pas la question de savoir en quoi consistait cette intention sur le point précis qui nous intéresse.

56. Son argumentation est pour le moins curieuse. Il accepte que les «articles de commerce» et les moyens de navigation constituent des notions par définition évolutives[108]. Donc, tout ce qui

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[102] Voir, entre autres : déclaration sous serment de Carlos Lao Jarquin, 27 janvier 2006, MCR, vol. 4, annexe 84 ; déclaration sous serment de Geovany Navarro Garro, 27 janvier 2006, MCR, vol. 4, annexe 85 ; déclaration sous serment de Pablo Gerardo Hernández Varela, 27 janvier 2006, MCR, vol. 4, annexe 86 ; déclaration sous serment de Santos Martin Arrieta Flores, 27 janvier 2006, MCR, vol. 4, annexe 87 ; déclaration sous serment de Carlos Luis Alvarado Sánchez, 27 janvier 2006, MCR, vol. 4, annexe 88 ; déclaration sous serment de Daniel Soto Montero, 27 janvier 2006, MCR, vol. 4, annexe 89 ; déclaration sous serment de Luis Ángel Jiron Angulo, 28 janvier 2006, MCR, vol. 4, annexe 90 ; déclaration sous serment de Marvin Hay Gonzalez, 28 janvier 2006, MCR, vol. 4, annexe 91 ; Armando Perla Pérez, 28 janvier 2006, MCR, vol. 4, annexe 92.

[103] CR 2009/4, p. 55-56, par. 14 (Pellet).

[104] Voir, entre autres : déclaration sous serment de Santos Martín Arrieta Flores, 27 janvier 2006, MCR, vol. 4, annexe 87 ; déclaration sous serment de Marvin Hay Gonzalez, 28 janvier 2006, MCR, vol. 4, annexe 91 ; déclaration sous serment de Ruben Lao Hernández, 17 février 2006, MCR, vol. 4, annexe 103.

[105] Déclaration sous serment du brigadier général Denis Membreño Rivas, 10 mars 2008, DN, vol. II, annexe 73.

[106] CR 2009/4, p. 49-55, par. 3-12 (Pellet).

[107] *Ibid.*, p. 50, par. 3 (Pellet).

[108] *Ibid.*, p. 51-52, par. 6 (Pellet).

est marchandise ou navire aujourd'hui tombe sous le coup de l'article VI. Par contre, selon lui, le terme «commerce» devrait garder la signification qu'il avait en 1858[109]. Si l'on suit le professeur Pellet, son coéquipier Antonio Remiro aurait tort, puisque d'après ce dernier, la deuxième acception du terme «comercio», celle de «communication», ne devrait pas être prise en considération aujourd'hui, car elle serait tombée en désuétude[110]. Je crois, Monsieur le président, que la Partie adverse devrait d'urgence accorder ses violons…

57. La référence qu'Alain Pellet a faite à la sentence arbitrale rendue dans l'affaire du *Sheikh d'Abu Dhabi* est loin d'appuyer la thèse du Nicaragua. Il est dit dans cet extrait, qu'il convient de «présumer qu'une personne qui cède des droits de propriété de grande valeur n'entend disposer que des droits qu'elle possède au moment de la cession». D'après le professeur Pellet, tel serait le cas du Nicaragua dont «on ne peut présumer qu'il ait cédé au Costa Rica des droits dont personne n'envisageait l'existence en 1858»[111]. *Primo*, il est inutile de chercher dans le traité de limites la cession ou l'octroi par le Nicaragua de droits au Costa Rica. La reconnaissance de la souveraineté nicaraguayenne et le droit de navigation costa-ricien vont de pair à l'article VI. *Secundo*, le transport des passagers sur le fleuve San Juan existait déjà à l'époque de la conclusion du traité et c'est le Nicaragua qui l'a qualifié d'activité lucrative[112]. Le parallèle établi avec l'affaire du *Sheikh d'Abu Dhabi* est donc tout simplement fallacieux.

58. La réponse juridique correcte à la question est simple. Pour paraphraser les formules employées par votre Cour dans l'affaire du *Plateau continental de la mer Egée*, le «commerce» est un terme générique englobant toutes pratiques «de nature à être légitimement considérées comme se rapportant» (*Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 31, par. 74) à cette activité et comme «revêt([ant) à tout moment la signification que pourraient lui donner» (*ibid.*, p. 32, par. 77) les circonstances qui prévalent au moment de l'interprétation. Sinon, va-t-on prétendre que pour chaque traité de commerce et de navigation, il faudra figer leur portée à l'égard des activités commerciales uniquement au moment de leur conclusion ?

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[109] *Ibid.*, p. 52, par. 7 (Pellet).

[110] *Ibid.*, p. 44, par. 35 (Brotóns).

[111] *Ibid.*, p. 54, par. 10 (Pellet)

[112] CMN, par. 4.1.37 ; DN, par. 3.91.

59. Que telle ait été l'intention des parties est de surcroît confirmé par la qualification de «perpétuel» du droit de navigation reconnu au Costa Rica. Pour reprendre à nouveau ce que votre Cour a dit sur un point tout à fait comparable où il était question d'un instrument sans limite de durée, «il ne semble guère concevable que dans un instrument semblable on ait voulu donner à [ce terme] … un contenu invariable quelle que soit l'évolution ultérieure» (*ibid.*, p. 32, par. 77)[113].

60. Cette réponse s'impose avec d'autant plus de force que la pratique ultérieure suivie par les parties dans l'application du traité a *enregistré cette compréhension du terme* «commerce»[114]. C'est le ministre du tourisme du Nicaragua lui-même qui a reconnu que le droit costa-ricien de libre navigation incluait la navigation touristique car le tourisme — selon lui, est une forme moderne de commerce[115].

Conclusion

61. Monsieur le président, Messieurs les juges, l'interprétation que le Costa Rica donne de l'article VI est appuyée par les règles d'interprétation que votre Cour a toujours suivies. Elle est confortée par tous les éléments pertinents. Ces éléments ne laissent aucun doute quant au sens qu'il convient de donner à l'expression «con objetos de comercio». Il s'agit d'un droit de libre navigation qui englobe tant le transport de passagers que celui de marchandises, exercé tant par des navires publics que privés.

62. Monsieur le président, je vous remercie de votre attention et vous prie, sans doute après la pause, de donner la parole à mon collègue et ami le professeur Lucius Caflisch.

The PRESIDENT: Thank you, Professor Kohen, for your presentation. As you suggest, the Court can have a short coffee break for about 10 minutes and we will resume the session.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Caflisch.

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[113] *Affaire concernant le Filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France, sentence du 17 juillet 1986, RSA*, vol. XIX, p. 247, par. 37.

[114] *Ibid., sentence du 17 juillet 1986, RSA*, vol. XIX, p. 247, par. 37.

[115] MCR, par. 4.69 et vol. 5, annexes 138 et 139 (dossier de plaidoiries, onglet n° 24).

Mr. CAFLISCH: Thank you, Mr. President.

III. NICARAGUA'S SOVEREIGNTY OVER THE SAN JUAN RIVER AND COSTA RICA'S PERPETUAL RIGHT OF FREE NAVIGATION

1. Introduction

1. Mr. President, Members of the Court, my observations today will bear on two matters: first, the relation between Nicaragua's sovereignty over the waters and bed of the San Juan River and Costa Rica's perpetual right of free navigation; and second, the reasonableness and lawfulness of Nicaragua's regulations and measures relating to the portion of the river where navigation is common.

2. Before broaching these issues, I should like to respond briefly to four points made by Ambassador Argüello Gómez in his introductory presentation[116].

3. *First*, Mr. Argüello Gómez stated that, in making her claims, Costa Rica pretended in fact to be the river's co-sovereign. Quoting the great Latin American jurist Andres Bello on the content of *sumo imperio*, he asked what would remain of that *imperio* if Costa Rica's claims were found acceptable. That question could, with at least equal justification, be turned around: what would remain of Costa Rica's "right" of navigation if its exercise were entirely subordinated to Nicaragua's *summum imperium*?

4. *Second*, the distinguished Agent of Nicaragua contended that Costa Rica aspires to an unlimited right of navigation: as Costa Rica's written pleadings and oral arguments show, this is not the case: Costa Rica objects to crippling, disproportionate, ineffective and discriminatory regulations and measures. As pointed out during the first round of oral argument, Costa Rica would not object, for instance, to frequent and attentive patrolling, for instance to curb drug traffic and smuggling[117]. What she does object to are measures substantially narrowing her right of navigation, for instance by insisting on *Nicaraguan* Departure Clearance Certificates and by controlling every Costa Rican boat, on every journey and return journey, at every Nicaraguan army post, and by levying fees and taxes.

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[116] CR 2009/4, pp. 12-14.

[117] CR 2009/3, p. 28.

5. Ambassador Argüello Gómez concluded that Nicaragua holds all police powers, and Costa Rica none. One wonders how this is supposed to tally with what President Cleveland had to say when, in paragraph 2 of his award in 1888, he ruled that:

> "Costa Rica may navigate said river with such vessels of the revenue services as may be related to and connected with her [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in said Article [Article VI of course] or as may be necessary to the protection of said enjoyment"[118].

6. A last observation to be made here relates to the assertion that, at the meeting point of the San Juan and the Colorado, 90 per cent of the waters go into the Colorado. What does this have to do with the present case? One could assert, with equal justification, that Costa Rica contributes about 70 per cent of its waters to the San Juan, while the contribution of Nicaragua amounts to 30 per cent.

2. Nicaragua's sovereignty over the San Juan River and Costa Rica's perpetual right of free navigation

7. Allow me now, Mr. President, Members of the Court, to deal with the relationship between sovereignty and the perpetual right of free navigation. Mr. Brownlie has rightly pointed out that stability is the main objective of boundary treaties. I would go so far as to say that the instrument in point, the 1858 Cañas-Jerez Treaty, also had the object of achieving stability, which does not mean, however, that it is an ordinary treaty establishing a boundary. As Nicaragua has remained remarkably discreet on the issue, I should like to recall that the Treaty of 1858 establishes a comprehensive legal régime for the area of the San Juan River: establishment of the international boundary on the Costa Rican bank on the lower San Juan (Art. II); right of both riparian States to sail ships on the part of the river open to common navigation, and right of the ships of both States to accost on the banks of the other State (Art. VI); establishment of the waters at each end of the boundary (the waters of the Salinas Bay and San Juan del Norte) as *condominia* (Art. IV); common defence of the river in the event of external aggression (Art. IV); prohibition of acts of war on the river, on Lake Nicaragua or in the port of San Juan del Norte (Art. IX) and duty for Nicaragua to consult Costa Rica if it plans to canalise the river area are in the offing (Art. VIII).

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[118] MCR, Vol. 2, p. 18.

8. I find it difficult indeed to accept that we are in the presence of a simple boundary treaty. It is, rather, a combination of different pieces which are constitutive of a boundary and a régime. To borrow from the language used by my friend and colleague Ian Brownlie, the amalgamation of these elements produces a sort of legal "porosity" — a porosity incidentally to be found in other, similar treaty instruments.

9. The characterization of the 1858 Treaty as a boundary treaty, and little else, has led Nicaragua to claim that that Treaty's main element is her sovereignty over the waters and the bed of the river, whereas in Costa Rica's view, as perceived by Nicaragua, her navigation rights predominate. It is this point which forms the main bone of contention between the Parties.

10. According to Nicaragua, her own sovereignty must be paramount, and exceptions to it must, pursuant to this Court's case law, be construed restrictively. I have already attempted to show that that case law becomes relevant only if there is a doubt over the meaning to be attributed to the provision under consideration[119]. In the absence of such doubt, the interpretation must follow the canons of treaty interpretation set by the 1969 Vienna Convention, including the principle *ut magis valeat quam pereat*: the concept of free navigation cannot be rendered nugatory by subordinating it to the will of the territorial sovereign. It cannot be left to unilateral determination by that State.

11. Costa Rica's view of the matter is quite different. As is true for most concepts of international law, sovereignty is not absolute; it is affected by the relevant State's specific rights and duties. In other words, as was pointed out in the first round of oral argument, there is no hierarchy sovereignty/right of navigation but sovereignty tempered by international obligations inherent in the Treaty régime[120]. There is nothing extraordinary to this.

12. This reasoning seems to be confirmed by the defendant Party itself. Indeed, in her Rejoinder[121], Nicaragua takes care to demonstrate that the regulations issued and measures taken by her are "reasonable". According to Costa Rica, they are not; but the very fact that Nicaragua tries to justify them as such amounts to an admission that Nicaragua's sovereignty is indeed limited

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[119] CR 2009/2, pp. 43-44.

[120] CR 2009/3, pp. 32-33, 36 and 45.

[121] RN, Vol. II, 4.34 – 4.98.

by the obligations imposed through the Cañas-Jerez Treaty, in particular those resulting from Costa Rica's perpetual right of free navigation.

13. In the conclusion to this first part of my intervention, I will stress the following points:

(i) The instrument of 1858 is a treaty establishing a boundary and a multifaceted international régime governing a waterway.

(ii) This being the case, sovereignty and the right of navigation are pieces of one and the same picture. They are on a par in the sense that it cannot be said, simplistically, that the one dominates the other. And

(iii) For the present case, this means that Nicaragua cannot exercise her sovereignty via measures and regulations that are unlawful, discriminatory or unreasonable in the sense that Costa Rica's navigational interests are disproportionately affected. These regulations and measures must also be effective ones, that is, be capable of preventing and curbing undesirable activities such as smuggling and drug traffic.

14. These conclusions bring me to the second theme I propose to deal with, namely, the lawfulness and reasonableness of Nicaragua's regulations and measures curtailing Costa Rica's perpetual right of free navigation.

3. Lawfulness and reasonableness of Nicaragua's regulations and measures

(a) *General issues*

15. Mr. President, Members of the Court, I therefore now come to the question of the right to regulate the uses of international watercourses such as the San Juan. The defendant State has invoked a series of authorities and precedents to buttress that right. Mr. Brownlie has cited a number of authorities to establish that there is no general right or freedom of river navigation in Latin American practice[122]; we did not say that there was. Nor did we express the "extravagant" opinion[123] that that right of navigation, stipulated and not merely "referred to" by the 1858 Treaty, was, and I cite Mr. Brownlie, "in some sense absolute and peremptory". What we did say and what we maintain is that a treaty right to free navigation cannot be regulated out of existence by

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[122] CR 2009/4, p. 30.

[123] *Ibid.*

invoking Nicaragua's sovereignty. This observation is also valid for the passages quoted from Wheaton and O'Connell.

16. There remains the case of *MacMahan* (USA) v. *United Mexican States*, quoted extensively by Mr. Brownlie[124]. The case related to the Rio Grande forming the boundary between Mexico and the United States, on which freedom of navigation prevailed, and to American citizens navigating on it. The majority of the US/Mexico General Claims Commission found that Mexico was "entitled to exercise police powers, *some* police powers at least, over the course of the Rio Grande", without, however, defining them. In that same decision, one finds the following caveat:

> "It is reasonable to think that the right of local jurisdiction shall not be exercised in such a manner *as to render nugatory the innocent passage through the waters* of the river, particularly if established by treaty."[125] (Emphasis added.)

This observation is very pertinent for the present case. Another observation which needs to be made is that, unlike the present situation, the Río Grande is a river whose waters are divided between the two riparians, probably in the middle of the thalweg, and where, consequently, the navigators could always try to pass on the side of their national State. Costa Ricans do not have such an opportunity.

17. In his intervention of 6 March 2009, Mr. Reichler referred to three further texts dealing with the regulatory power of States[126]. Article 6 of the Barcelona Statute on the Regime of international waterways of 1921 enables riparians to enact laws and regulations on public health, control of diseases, movement of persons, and customs,

> "it being understood that such stipulations must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the Contracting States, including the State which is their author, *and must not without . . reason impede the freedom of navigation*" (emphasis added).

18. The "Projet de règlement international de navigation fluviale" adopted in 1887 by the Institute of International Law is essentially a set of general international regulations, not containing anything specific on *national* regulations. All it says in its Article 28 is that each riparian preserves

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[124] *Ibid.*, p. 32.

[125] United Nations, *Reports on International Arbitral Awards (RIAA)*, Vol. IV, p. 490.

[126] CR 2009/4, pp. 13-14.

its sovereign rights over its portion of the rivers, but "dans les *limites établies par les stipulations de ce règlement et les traités ou conventions*" (emphasis added).

19. Another text cited by Mr. Reichler are the Berlin Rules on Water Resources adopted in 2004 by the International Law Association, not without some dissent, however. Article 45 of those Rules allows a riparian State to

> "regulate, limit or suspend navigation as appropriate for the purpose of public safety, health, or the environment, over that portion of the watercourse within its jurisdiction, provided the State does not discriminate against the shipping of another riparian State and does *not unreasonably interfere* with the enjoyment of the rights of navigation . . ."[127] (emphasis added).

20. Finally, one really fails to see what the 1936 Montreux Convention on the Turkish Straits[128] has to do with this case. The Straits Convention pertains to the law of the sea, not to watercourses. One is under the impression that Nicaragua amalgamates the law of sea with that of international watercourses whenever convenient. Moreover, the Article cited states that there is freedom of transit and of passage in the Straits and that that freedom is regulated — that means governed — by the provisions of the Convention. I fail to see what this could prove in the context of the present case.

21. The Court will note that none of these texts relate to boundary treaties conferring a right of navigation. None of them take into account the special situation where the boundary follows the bank of the river. One can nonetheless deduce from them that, when mentioning regulations, they specify that they must be reasonable, non-arbitrary, non-discriminatory. This has been, and also is, the position of Costa Rica: riparian States may regulate if they respect these conditions. Mr. President, Members of the Court, the time has now come to turn to Nicaragua's regulations and measures.

(b) *Regulations applied and measures taken by Nicaragua*

(i) General observation

22. Before examining these regulations and measures one by one, I shall make two preliminary observations — one of a specific and one of a general character. First, it has to be

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[127] RN, Vol. II, Ann. 72.

[128] League of Nations, *Treaty Series*, Vol. 173, p. 215.

noted that Nicaragua's environmental engagement has certainly acquired momentum as a result of the present case, although some caveat may have to be entered on account of the failings referred to earlier in the present oral argument[129]. In the general area of environmental protection, on the basis of the Molina affidavit[130], Nicaragua has, among other things, tried to make a point on logging. There is no evidence, however, that the wood mentioned in that affidavit was indeed cut in Nicaragua by Costa Ricans. This could just as well have been done on the Costa Rican side. How, by whom, when and where the picture reprinted in Nicaragua's Rejoinder was taken[131], no one knows.

23. The second observation, the condition of *reasonableness* for regulations and measures includes the need for them to be effective, so as to achieve the purpose for which they are adopted. If they are not effective, they are of no use and, therefore, unreasonable. The condition of *non-discrimination* is, in my view at least, disregarded, if fees collected are not the same for everyone or if they change all the time. Finally, the prohibition of *arbitrariness* serves to prevent, *inter alia*, that regulations are adopted, and measures taken, without a proper legal basis and without being communicated to those to which they are intended to apply, Costa Rica in the event. Legal certainty and transparency are the surest means to avoid arbitrariness.

(ii) Obligation to stop and register

24. Let me now turn to the first specific measure, which is the obligation to stop and register. The duty of stopping and registering allegedly serves a multitude of purposes which have been reviewed in great detail. Its preventive virtues have been praised. One of Costa Rica's main objections is that for each and every journey a fee of US$5 plus a handling fee of US$2 for entering the country and another handling fee of US$2 for leaving it have to be paid. While this sum may seem trifling to lawyers litigating before this Court, it is a lot for the inhabitants of a poor area of Costa Rica whose daily lives depend on the river. One also wonders what the services rendered really are, since their contribution to crime and accident prevention appears to be slim. Finally, one may well ask whether these incessant controls — twice a day, for every journey, at every border

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[129] CR 2009/3, pp. 25-26.

[130] RN, Vol. II, Ann. 72.

[131] RN, Vol. I, p. 93.

post — remain within the purview of what is reasonable? Do they not, rather, amount to a form of harassment?

(iii) Departure clearance certificates (DCC)

25. I come next to the departure clearance certificates. We were told, at the end of last week, that the issue of such certificates by Nicaragua is primarily aimed at making sure that vessels are safe and seaworthy, and also at verifying who and what is on board[132]. The fees charged, which are meant to pay for services rendered, have varied, as is shown in an annex to the Costa Rican Memorial[133], between US$5 and 25 — you will find a US$25 receipt in your folders at tab 62 (projection) — and they are levied for every journey. For the boatmen in the area, US$25 is a considerable sum if measured against local salaries and profits. Having myself travelled in the area, as all of Costa Rica's counsel have, *et ergo* in Arcadia, I have witnessed both the handling of the stopping and registering requirements and the inspection of the boats to check their seaworthiness and the identity of the cargo and passengers. I was unlucky; though a fee was paid, I saw no inspection of the boat. There was no service rendered for which a fee could be collected.

26. Here again, Mr. President, one wonders about where the legal basis for this requirement lies, as no supporting legislation has been supplied, except for visas and tourist cards. The claimed preventive value of the measure is minimal as it is not applied methodically. The varying fees suggest arbitrariness.

27. It is alleged, however, by the other side, that local Costa Rican residents are "regularly" issued departure clearance certificates free of charge, "strictly as a courtesy" as was said by Mr. Reichler[134]. Just how "regular" that practice was is shown by the evidence presented by Costa Rica in her Memorial and in her Reply: out of six local residents, four testified that they were charged[135].

28. Mr. Reichler justifies the imposition of a fee for the departure clearance certificates on the ground that it is not an "impost", which would breach Article VI, but "a fee for service, a

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[132] CR 2009/5, p. 20.

[133] MCR, Vol. 6, Ann. 241.

[134] CR 2009/5, p. 21.

[135] MCR, Vol. IV, Anns. 92, 96, 103 and 108; RCR, Vol. II, Anns. 50 and 51.

'redevance', not a tax"[136]. He insisted on this point, suggesting that my characterization of the fee as a tax[137] was "contradicted by all the evidence". Mr. Reichler cites no evidence in support of his assertion that[138] services are provided: and that assertion is contradicted by evidence in the record, namely, evidence from Costa Rican boatmen that no inspection, no service has ever been provided in exchange for a departure clearance certificate[139]. This evidence is not acknowledged in Nicaragua's Rejoinder, which merely asserts, without reference, that an inspection is performed. Nor is it acknowledged by Mr. Reichler, who did the same.

29. Whatever Nicaragua may call the charge for the departure clearance certificates, in the absence of the provision of a service, and no matter how small the charge, it is properly characterized as a tax[140]. Furthermore, if a service is provided, the charge must not exceed the actual cost of the inspection[141]: it cannot be varied at will by the Nicaraguan army officer on duty. The distinction between a tax and a fee for services rendered[142] is well known in international law and practice, and there is no reason to suggest that it is not applicable in the present case. The references in support of this proposition are set out in the footnotes to my intervention.

30. There is, finally, the alleged recognition by Costa Rica of the departure clearance certificate procedure practised by Nicaragua. The meeting of the Binational Commission, in 1997, dealt with drug traffic and was intended to draw the attention of the Nicaraguan authorities to that issue. The measure discussed at the meeting was that each State should see to it that vessels "navigate only if duly registered by the posts that issue corresponding navigation certificates; in

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[136] CR 2009/5, pp. 21-22.

[137] CR 2009/5, p. 22.

[138] CR 2009/3, p. 29.

[139] RCR, Ann. 51, pp. 281-282; Ann. 52, p. 283.

[140] See for example case 24/68 *Commission* v. *Italy* [1969] ECR 193; case 18/71 *Eunomia* v. *Italy* [1971] ECR 811; case 39/73 *REWE-Zentralfinanz* v. *Direktor der Landwirtschaftskammer Westfalen-Lippe* [1983] ECR 1039; case 314/82 *Commission* v. *Belgium* [1984] ECR 1543.

[141] See for example case 18/87 *Commission* v. *Germany* [1988] ECR 5427; case 132/82 *Commission* v. *Belgium* [1983] ECR 1649; case 24/68 *Commission* v. *Italy* [1969] ECR 192; *Commission* v. *Belgium* [1984] ECR 1543; case 46/76 *Bauhuis* [1977] ECR 5. See also Art. II.2 *(c)* GATT 1994; Art. VIII.1(a) GATT 1994; WTO Panel Report, India — Additional and Extra Additional Duties on Imports from the United States, 9 June 2008, paras. 7.301-7.394; WTO Panel Report, United States — Import Measures on Certain Products from the European Communities, 17 July 2000, para. 6.70; GATT Panel Report, United States — Customs User Fee, 2 February 1988, paras. 68-117; GATT Panel Report, European Community — Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetable, 4 October 1978, para. 4.6.

[142] Art. II.2 *(c)*, GATT, 1994.

this case, the posts at San Juan del Norte, San Carlos and Sarapiquí"[143]. What this means is a registration requirement with a — Costa Rican or Nicaraguan — border post entitled to deliver such certificates. It is nowhere said that vessels have to obtain, from Nicaragua, departure clearance certificates which have to be issued for every journey, nor, *a fortiori*, that Costa Rica had condoned such a practice. This is a far cry from finding, as Mr. Reichler did, that "Costa Rica herself agreed that there was good reason for both the registration and departure clearance requirements imposed by Nicaragua and that she approved of them on that basis"[144]. The developments in the Costa Rican Memorial show that the requirement of departure clearance certificates has been objected to continuously from 1980 to this day[145].

(iv) The prohibition of travel at night

31. I now come to the prohibition to travel at night. As pointed out, earlier[146], navigation in the upper part of the San Juan may be dangerous; it is much less so in the portion of the river open to common navigation: here the river is wide and, apart from fallen branches and some banks, as they are found in most other navigable waterways, there are few major obstacles. In the past, no prohibition of travelling by night existed; but perhaps our friends from the Nicaraguan side will tell us that the San Juan has become dangerous as a result of the army's "Action Plan"[147]. That Plan is the sole basis of the measure, so far as we are aware, and it was not communicated by Nicaragua to the Costa Rican Government. This is certainly a most extraordinary way of conducting neighbourly relations, due perhaps to an over-optimistic view of what "sovereignty" means in the context of the 1858 Treaty.

32. In my previous intervention on this point, I ventured to suggest that, maybe, a better and less intrusive way to reduce or obviate the hazards of night travel would be to co-operate and to install some lights on the river's banks and, also, to oblige embarkations sailing at night to carry lights. This is a standard requirement for nocturnal travel both on international rivers and in the

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[143] RN, Vol. II, Ann. 4.

[144] CR 2009/5, p. 21.

[145] MCR, Vol. I, 5.11-5.26.

[146] CR 2009/3, p. 31.

[147] RN, Ann. 48.

coastal waters of all States, rich or poor. Mr. Argüello Gómez has credited me with being well intentioned but unfamiliar with the river and unaware of the extreme poverty characterizing most of the local population[148]. I let him be the judge of my unawareness but one thing is certain: the use of lights, especially on the basis of a common agreement, would serve the safety of navigation at least as well, and probably better, than the highly intrusive measure taken by Nicaragua to prohibit navigation for 12 out of 24 hours every day.

33. Relating to the nocturnal activities by Nicaraguan vessels, Mr. Reichler states that my "geography is a bit off"[149]. That may be so. It is a fact, however, that nocturnal movements by Nicaraguan ships do take place in the upper parts of the San Juan River. This fact is attested to by two illustrations, which are being projected right now[150]. These illustrations, indicating the places and times of departure and arrival, can be seen on the screen, as I said, and also under tab 63 of your folders. This is unquestionably a matter of domestic concern. But it does show that what may be considered dangerous for some — and the upper reaches of the river *are* dangerous — is not judged dangerous for others.

34. In short, the prohibition complained of is unlawful, unreasonable, arbitrary and lacks any legal basis other than the army's "Action Plan".

(v) The duty to fly the Nicaraguan flag

35. I now come to the duty to fly the Nicaraguan flag. I shall be very brief on this. Despite my peregrinations on the San Juan, I am not certain whether the hoisting of the Nicaraguan flag is required of every Costa Rican vessel or only of those equipped with masts and turrets as asserted by Mr. Reichler[151]; the small boat in which I travelled carried a flag on one of its sides, as it had neither mast nor turret, perhaps this was a gesture of courtesy by the owner; perhaps, as is more likely, this was done for fear of sanctions. This leads me to Mr. Reichler's further assertion that there has not been a single incident of a Costa Rican boat being prevented from navigating without

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[148] CR 2009/5, p. 23.

[149] CR 2009/5, p. 24.

[150] See http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp and http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html

[151] CR 2009/5, p. 26.

displaying the Nicaraguan flag[152] — of course not, as the boatmen did not wish to provoke such incidents.

36. In my earlier intervention on this point I did mention the possibility of there being a practice, inspired by international courtesy, to show the territorial State's flag in addition to that of the flag State[153]. This statement led Mr. Reichler to conclude that "Nicaragua, as the sovereign over these waters . . . has the right to insist on this courtesy"[154]. I very much doubt this conclusion; how can one try to turn international courtesy into binding internal regulations relating to the exercise of a conventionally guaranteed right of navigation? These regulations are, incidentally, another fruit of the Nicaraguan army's "Action Plan" and, to my mind, serve very little purpose.

(vi) Immigration and visa requirements

37. I now come to the last series of measures, immigration and visa requirements. Mr. Reichler argues that in practice the visa requirement affects but few of the persons cruising on the river in tourist boats, as most of them need no visa. Moreover, "as a courtesy", local Costa Rican residents and boatmen are permitted to operate without visas or tourist cards[155] and, hence, have no financial burden to bear.

38. Costa Rica has shown, however, that *boatmen* were in fact required to secure visas to carry on their activities[156]: and some tourists were unable to complete their tour because their boatmen had no visa[157]. One boatman was detained by the Nicaraguan army for not carrying his passport and subsequently had to travel to San José twice and to purchase two visas[158]. This shows that sometimes exemptions are granted, sometimes not. Moreover, when Nicaragua argues that, as a matter of courtesy, local residents and boatmen are exempted from visa or tourist card requirements, this means, of course, that the exemption can be withdrawn whenever Nicaragua opts to do so.

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[152] *Ibid.*

[153] CR 2009/3, p. 33.

[154] CR 2009/5, p. 26.

[155] *Ibid.*, p. 25.

[156] MCR, Anns. 85, 87, 91, 92, 93, 95 and 189; RCR, Anns. 51 and 52.

[157] MCR, Ann. 86.

[158] MCR, Anns. 84, 238 and 244.

39. Inasmuch as these requirements are effectively applied, and are allowed to remain, they will have a considerable financial impact on boatmen: US$25 per visa, travel expenses to and from San José, US$5 per tourist, plus US$4 for immigration charges, also per tourist, and US$5 to US$25 for the Departure Clearance Certificate. Thus, if a boatman were to transport tourists on the San Juan River once a week throughout the year, he would have to spend over 100 days at the Embassy of Nicaragua in San José for the purpose of processing visas. This would amount to a total approximate sum of US$2,800. So much for Mr. Reichler's "non-burdensome immigration regulations"[159].

40. In legal terms, the measures in question are highly objectionable. As I have explained earlier, in most cases, boatmen and their passengers transit on the river *without* entering Nicaragua for any length of time[160]. This means that there should be no visa and tourist card requirements at all. I have also tried to explain why the need for *Nicaraguans* to obtain a visa when entering *Costa Rican territory* is irrelevant in this connection. The distinguishing factor is that Costa Rica has conventionally protected rights of transit passage on the river, whereas Nicaraguans entering Costa Rica are protected by no such right. As a result, the measures in question are unlawful in addition to being unreasonable.

4. CONCLUSIONS

41. Mr. President, Members of the Court, I have now come to the end of my intervention: my general conclusions hold in three points:

(i) Costa Rica maintains that Nicaragua's sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858.

(ii) The regulations enacted by Nicaragua must not infringe Costa Rica's perpetual right of free navigation. In particular, they must be lawful, public, non-arbitrary and non-discriminatory. Furthermore, they must be adapted to fulfil a legitimate public purpose.

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[159] CR 2009/5, p. 25.

[160] CR 2009/3, p. 28.

(iii) None of the measures applied by Nicaragua meet these conditions; they are in breach of the 1858 Treaty, the Cleveland Award and the 1916 decision of the Central American Court of Justice.

Thank you, Mr. President, Members of the Court, for your kind attention and forbearance. May I suggest that you now invite Professor Crawford to the floor.

The PRESIDENT: Thank you, Professor Caflisch, for your presentation. Now, I give the floor to Professor Crawford.

Mr. CRAWFORD:

IV. PUBLIC VESSELS, RELATED RIGHTS AND REMEDIES

Introduction

1. Mr. President, Members of the Court, in this presentation I will deal first with the issue of public vessels, secondly with related rights, especially subsistence fishing, and third with remedies. Given the positions taken by Nicaragua on the latitude points I can be happily brief.

Costa Rica's rights of navigation with public vessels

2. As to rights of navigation with public vessels, Professor Kohen has already demonstrated that Costa Rican State vessels enjoy the same rights of navigation for purposes of commerce as Costa Rican privately owned vessels. I will not come back on this, except to make one important point. This is that an official — a health worker, for example — can be transported on the river by way of commercial navigation. The Costa Rican health service does not possess its own boats. When they need to take medicines or provide other forms of health care to riparian communities, they do what any private person does who has to travel on the river and does not have a boat: they take one of the local boats at Sarapiquí or another riverine port which is for daily hire and travel in that. But these Costa Rican vessels are exercising the right of free navigation for commercial purposes. The fact that some of the passengers may be going to deliver medicines or treat a screwworm epidemic is irrelevant. The navigation is still commercial on any meaning of the term "commercial". London taxi cabs may not ply for hire without a licence. They ply for hire — they engage in commercial activity — even if they are carrying late Cabinet Ministers to meetings at

10 Downing Street. The same would be true of river taxis. The exercise by Costa Rican private boats of the perpetual right of free navigation is not dependent on the motivations of the passengers. Otherwise we will have a distasteful form of selection on the river bank: the public health personnel who are going to give drugs to local communities will be excluded (unless they have gone to San José, on each and every occasion, to apply for Nicaraguan Government permission for their mission and to get a visa); by contrast, the representative of foreign drug companies who propose to sell the same drugs as articles of trade are free to travel. The selection is to be carried out by junior military personnel on the Nicaraguan side. That is the Nicaraguan version of a perpetual right of free navigation.

3. But in what follows I am dealing with public vessels not exercising Article VI rights in the way that I have just described.

(a) *The Cleveland Award did not determine Costa Rica's rights to navigate with any and all public vessels*

4. Professor McCaffrey claimed that President Cleveland "ruled on the question whether Costa Rica has a right to navigate on the San Juan with its warships *or other public vessels*"[161]. According to him, the Cleveland Award prohibited navigation by all public vessels other than vessels of the revenue service[162].

5. This is not what the Cleveland Award says. The issue before Cleveland was carefully circumscribed: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"[163]. The fourth point of doubtful interpretation put by Nicaragua was similarly limited[164]. Nicaragua leaves out these words of limitation. The issues raised were in fact formulated to reflect the actual dispute between the Parties at the time. This can be confirmed by reference to the correspondence prior to the referral to arbitration: which refers only to navigation on the San Juan by the revenue guard[165].

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[161] CR 2009/5, p. 31, para. 11 (McCaffrey); emphasis added.

[162] CR 2009/5, p. 31, para. 11; p. 33 para. 18 (McCaffrey)

[163] Art. VI, Esquivel-Roman Convention, MCR, Ann. 16; see also Cleveland Award, MCR, Ann. 26, p. 457 (p. 98).

[164] MCR, Ann. 207, p. 10.

[165] CMN, Anns. 28, 29, 30, 31 and 32.

6. Nicaragua argues, on the basis of one hypothetical question posed by Costa Rica which takes up four lines out of a pleading of 181 pages, that "Costa Rica placed the issue of broad rights of navigation by public vessels before the arbitrator"[166]. That is not true. Costa Rica was making an incidental point in the course of argument, not reformulating the question asked. For its part in argument, Nicaragua made no reference to any vessels other than vessels of war, and vessels in the revenue service before President Cleveland. Neither the Parties nor the arbitrator debated the issue of navigation by public vessels in general[167]. Correspondingly, the terms of the award addressed the limited question of Costa Rica's right of navigation with vessels of war and vessels of the revenue service. Cleveland did not "[reject] the idea" of broad rights of navigation by public vessels[168], either expressly or by implication. What did he decide?

(b) *The Cleveland Award recognized a specific treaty right of navigation for revenue vessels*

7. Professor McCaffrey argued that Cleveland was determined to cause "the least possible impairment to Nicaragua's sovereignty", and that this can be seen "from his sharp curtailment of the navigational rights proposed by Rives for Costa Rica"[169]. Professor McCaffrey went to great pains to show the Court that Cleveland modified Rives's draft "in his own hand" and "substituted his own, much more restrictive ruling"[170]. In fact the drafts show exactly the opposite: Cleveland substituted for Rives's proposal of a mere "privilege", a specific treaty right of navigation for vessels of the revenue service.

8. (Tab 64) In its original version, Rives's draft proposed that Costa Rica's privileges would be the same as any other nation in time of peace. He referred to "general usage . . . [which] constitute[s] an *imperfect right* entitling such vessels to claim hospitality"[171]. Rives's proposal was simply that Costa Rica's vessels of war and of the revenue service should receive the treatment extended to those of any other nation. He derived from general international law, not from the Treaty, a practice of granting privileges — privileges — to foreign ships in territorial waters. For

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[166] CR 2009/5, p. 36, para. 26 (McCaffrey).

[167] See MCR, Ann. 208, pp. 48-49.

[168] CR 2009/5, p. 36, para. 26 (McCaffrey).

[169] CR 2009/5, p. 34, para. 21 (McCaffrey).

[170] CR 2009/5, p. 33, para. 21 (McCaffrey).

[171] CMN, original documents deposited within the Registry, Part II, Ann. 71, p. 217; emphasis added.

Rives, Costa Rica had no treaty right of navigation for vessels of its revenue service, only an imperfect right or privilege derived from general international practice. Costa Rica's treaty rights of navigation were, according to Rives, limited to rights of commercial navigation, and were not in any respect rights of public navigation. On this basis, Rives suggested the following text in response to the second question:

> "The Republic of Costa Rica has the same *privileges* of navigating the River San Juan with vessels of war or of the revenue service as civilized nations usually accord in their territorial waters to the public vessels of friendly powers in time of peace; *but no other or greater privileges.*"[172]

9. Cleveland disagreed, considering that Costa Rica had more than simply a "privilege" enjoyed contingently by any other State. Costa Rican revenue vessels were entitled to a specific and perpetual treaty right of navigation. That is to say, Cleveland, like it or not, found a treaty right of navigation for the public vessels he was asked about — revenue vessels. His decision stated:

> "The Republic of Costa Rica *under said treaty and the stipulations contained in the sixth article thereof*, has not the right of navigation of the river San Juan with vessels of war; but [he would have said "pero"] she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[173]

10. Cleveland authoritatively decided that Costa Rican revenue vessels held a treaty right to navigate "as may be related to and connected with her enjoyment of the purposes of commerce", or as may be necessary to protect the enjoyment of that right. Both Professor McCaffrey and Mr. Reichler quoted Cleveland as saying "related to and connected with navigation 'con objetos de comercio'"[174]. But Rives, though he understood Spanish, wrote in English, and he wrote "purposes of commerce" — because that was what both Parties had written, and because it reflected their understanding of Costa Rica's rights. Cleveland decided that Costa Rican revenue vessels had a right to navigate *for purposes of commerce* and a right to navigate to protect Costa Rican navigation for purposes of commerce. This was the main point — of all the points that

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[172] CMN, Vol. II, Ann. 72; emphasis added.

[173] MCR, Anns., Vol. 2, Ann. 16; emphasis added; see also CMN., Vol. II, Ann. 72.

[174] CR 2009/5, p. 31, para. 9 (McCaffrey); p. 42, para. 2 (Reichler); see also p. 32, para. 17 (McCaffrey); p. 35, para. 24 (McCaffrey); p. 45, para. 9 (Reichler); p. 46, para. 10 (Reichler); p. 51, para. 20 (Reichler); p. 54, para. 25 (Reichler); p. 56, para. 29 (Reichler).

were canvassed in the arbitration — this was the main point on which he disagreed with Rives — and it reflected a broader, not a narrower, view of Costa Rica's treaty rights.

11. In particular, whereas Rives had taken the position that Costa Rica must exercise its duties of protecting commerce entirely from its own bank of the river — the guards must run up and down amongst the trees, looking for things to protect apparently — Cleveland's formulation, already quoted, entailed a broader view. In the same context, Professor McCaffrey asserted that "Article IV says nothing about having to do this by boat"[175]: that is slightly strange. In practice, then and now, the only way to protect commerce on the river was by boat. I take it Professor McCaffrey is not suggesting that Costa Rica protects commerce on the river and in the common bays by, let us say, synchronized swimming!

12. Costa Rica explained in its written pleadings that the functions performed by the revenue guard at the time of the Cleveland Award are now performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civic Guards[176]. Nicaragua has produced no evidence and made no statement to the contrary. Mr. President, Members of the Court, I reiterate, this is *res judicata*. Professor Pellet may be apprehensive at the sight of a revenue vessel, but he strikes me as a man of more than ordinary courage. But that is what President Cleveland decided.

(c) *Both Parties agree that Cleveland affirmed rights of navigation for armed public vessels*

13. (Tab 65) In the first round I gave an overview of the practice of Costa Rican navigation on the San Juan with armed vessels. I did so because Nicaragua had refused to admit that revenue vessels were armed vessels, and that Cleveland had confirmed the existence of Costa Rican treaty rights of navigation with armed public vessels. For example, in its Counter-Memorial Nicaragua stated: "no armed navigation by Costa Rican vessels is permitted by the Treaty, as interpreted by the Award, without the prior authorization of Nicaragua"[177]. Nicaragua maintained this position in its Rejoinder[178], defending the 2005 Presidential Decree which stated: "The Government of

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[175] *Ibid.*

[176] CR 2009/3, p. 15, para. 28 (Crawford); MCR, App. B.

[177] CMN,, para. 3.1.56 *(d); see also ibid.*, para. 3.1.9.

[178] See, for example, RN, para. 5.33.

Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters."[179] Now this has always been a difficult point, given that Nicaragua argued before Cleveland that revenue vessels "are armed vessels, capable of enforcing their demands by force"[180], and given that the Rives Report reflected that fact[181]. But it seems that the tale of the *Chandler* and its fulsome reward for the President finally did the trick[182]! Costa Rica has a treaty right of navigation for its armed revenue service vessels, affirmed by the Cleveland Award and Nicaragua has now admitted it[183].

14. Now once that point is established, the issue of practice becomes an entirely subordinate one. The state of the dossier as to whether Costa Rica exercised its treaty right to navigate with revenue service vessels is irrelevant. I might add that the written records on both sides of the question are limited, and on Nicaragua's side, positively exiguous. But my point is that, once a right arises under a valid and subsisting treaty, interpreted by a competent arbitrator with the force of *res judicata*, the right survives independently of its exercise.

15. While I am, so to speak, on the *Chandler*, I should note that Professor Pellet has given the Court a further insight into the kind of vessel Cleveland was envisaging. As he pointed out, and it is true, the *Chandler* was formerly commissioned in the navy and it engaged in active service during the American Civil War[184]. Professor Pellet — looking over his shoulder — expressed a concern that Costa Rica immediately commission vessels of the same size and the same attributes as the *Chandler* or the *Forward*, and send them onto the San Juan[185]. This was not my purpose in using the example of the *Chandler*, and Costa Rica has better things to do with its limited budget than commission new revenue cutters on this scale. I simply use it to demonstrate two things. First, that President Cleveland was perfectly aware — and if he had not already been aware the parties had told him — that revenue vessels were armed. Secondly, that it would be utterly

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[179] RCR, Ann. 69; RN, paras. 5.30-5.32.

[180] MCR, Ann. 208, p. 49.

[181] CMN, Ann. 70, p. 4.

[182] CR 2009/3, pp. 13-14, para. 23 (Crawford).

[183] See, for example, CR 2009/5, pp. 34-35, paras. 23-24 (McCaffrey); *ibid.*, p. 60, para. 10 (Pellet).

[184] http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf cited in CR 2009/5, p. 60, para. 10 (Pellet).

[185] CR 2009/5, p. 60, paras. 10-11 (Pellet).

paradoxical if Cleveland had permitted armed revenue service vessels to navigate on the San Juan without infringing his prohibition of vessels of war, while at the same time prohibiting navigation by these humble Costa Rican public vessels, which perform the same tasks, including necessary tasks of resupply of border posts guarding the river from the Costa Rican side.

16. As I have said, in light of Nicaragua's admission that Cleveland expressly permitted navigation by armed revenue vessels on the San Juan, the consistency of Costa Rica's subsequent practice of armed navigation assumes less significance. Nevertheless, Mr. Reichler said "Costa Rica has failed to present . . . any official documentation, or for that matter, any other evidence, establishing . . . Costa Rica's actual exercise" of its right of navigation with revenue vessels[186]. This is not true. On Tuesday I directed you to the documentary evidence[187] which suggests that the revenue guard was engaged in the activities it was directed to perform under the Decree of 1886[188]. The very fact that Nicaragua pressed the point before Cleveland suggests that those vessels were actually navigating — otherwise the point would have been moot.

17. (Tab 66) Mr. Reichler's claim that there is no evidence of Costa Rica's exercise of the right in more recent times can be disproved by reference to only one example. The Report of the Revenue Guard at the Mouth of the San Carlos River, dated 26 July 1968, states that the Guard received a complaint regarding the noxious plant Ipecac — I gather the Ipecac comes from the root of the plant — at a place called Infiernito (considering that it had a noxious plant there, perhaps aptly named Infiernito), a community on the San Juan River, and that they "went to said place" and made an inventory of the Ipecac they found there[189]. As you can see on the screen, from Boca San Carlos to Infiernito the distance along the San Juan is about 26 km, a journey which would take rather less than an hour by boat. Now Nicaragua notes that the Report does not say explicitly "we travelled on the San Juan River", and asserts that Infiernito is accessible by land from Boca San Carlos[190]. It does not reference or produce any map to support that claim; the only map it

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[186] CR 2009/5, p. 44, para. 6 (Reichler).

[187] MCR, Anns. 211, 212, 213, 215, 215 and 216; RCR, Anns. 31 to 38.

[188] MCR, Ann. 206, Art. 5th.

[189] RCR, Ann. 33, p. 245.

[190] RN, para. 5.72.

produced was the Ecomapas map[191], which we have dealt with, which does not mark Infiernito or show any relevant road. In fact there is no direct road between Boca San Carlos and Infiernito, there are some circuitous unpaved tracks accessible during the dry season. But the incident occurred in July, in the middle of the wet season. This is only one example; I have referred the Court to further documentary evidence[192]. The practice is corroborated by Nicaragua's own affidavit evidence, which confirms that Costa Rican civil guard boats navigated on the river during the 1960s and the 1970s[193].

(d) *The Cuadro-Lizano Joint Communiqué establishes the* status quo ante *practice of notification, not authorization*

18. (Tab 67) I turn to Professor McCaffrey's characterization of the Cuadro-Lizano Joint Communiqué which, he said, "shows that Costa Rica recognizes that she requires the permission of Nicaragua to navigate on the river with public, armed vessels to resupply her border posts"[194]. Professor McCaffrey did not cite the text of the Communiqué, and that is understandable since nowhere in the text do the words "permission" or "authorization" appear. The operative paragraph is on the screen and in tab 67 in your folders. I will not read the whole of it, I simply highlight the key words:

> "Third: Both Ministers manifest their willingness to resolve this regrettable inconveniences that occurred over the past few days and, for this purpose, they are establishing the following orders for their respective subordinates:
>
> 1. The crew of the vessels of the Public Force of Costa Rica that carry out relief of police and the supply of the border posts located on the right bank of the San Juan River *will navigate [will navigate] along the aforementioned river after having given the required notice [aviso]* carrying only their normal arms, and the Nicaraguan authorities may accompany the Costa Rican vessels making this journey along the San Juan River in their own separate means of transportation. Should the Nicaraguan vessel not accompany the Costa Rican vessels, the latter may carry out their rounds in keeping with the corresponding border post reports as indicated in this agreement.
>
> 2. *The Costa Rican authorities must report [reportarse]* to the Nicaraguan posts throughout their journey along the San Juan River." (Emphasis added.)

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[191] *Ibid.*, p. 280.

[192] See for example CRM, Anns. 88, 90, 94 and 103.

[193] RN, Ann. 65, p. 404, para. 6 (Espinoza).

[194] CR 2009/5, pp. 38-39, para. 36 (McCaffrey).

A very carefully drafted balance.

19. Nicaragua claims that the Communiqué requires Costa Rica to "obtain Nicaragua's permission in every case" and that requests for authorization were made prior to each voyage[195]. Well, you can read it for yourself. It only requires *notice*; it allows Nicaraguan authorities navigating in their own vessels to accompany the Costa Rican vessel on the San Juan, but it is clear that Costa Rican vessels are not prevented from navigating if the Nicaraguan authorities choose not to accompany them; the Costa Rican vessels must *report* to any Nicaraguan post but there is no indication that they can be turned back if they comply with the terms of the Communiqué. This system reflected the *status quo ante*, which was one of notification and reporting, not authorization. This balanced practice has now been outlawed by Nicaragua.

(e) *Nicaragua's claim that the* status quo ante *for police navigation was a system of Nicaraguan authorization*

20. Mr. Reichler devoted much energy on Friday to his argument that Costa Rica had provided no evidence that it re-supplied its border posts on the San Juan. But even he was forced to concede that "Costa Rican police traversed the San Juan to bring personnel or supplies to border posts or to engage in law enforcement activities" between 1994 and 1998, this in light of a detailed police report in Annex 227 of the Memorial[196]. In respect of this evidence, he reverts to Nicaragua's familiar and unsupported claim that the navigation must have been with express Nicaraguan permission, even though the document does not say this[197].

21. (Tab 68) You will recall that in its Rejoinder, Nicaragua claimed that Costa Rica had sent its vessels onto the San Juan to detain Nicaraguans, relying on a segment of this same report[198]. But as Mr. Sergio Ugalde pointed out, the detention occurred at Boca Tapada, some 25 km inland in Costa Rica's own territory[199]. Nicaragua has not reverted to that claim. But now Mr. Reichler argues that "Costa Rica began to send her armed police vessels onto the San Juan . . . for the purpose of intercepting Nicaraguans thought to be illegally bound for Costa Rica". He

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[195] CR 2009/5, p. 39, para. 36.

[196] CR 2009/5, p. 47, para. 12; see MCR, Ann. 227.

[197] CR 2009/5, p. 47, para. 12.

[198] RN para. 5.88.

[199] CR 2009/2, p. 27, para. 12 (Ugalde).

referred to the same page of the same report and claimed that Costa Rica's own documentary evidence showed that Costa Rican police vessels "transported detained Nicaraguans at gunpoint on the San Juan River in June of 1998"[200]. The relevant entry is on the screen and is in tab 68 of your folder. I won't read it again, I will simply summarize what it says.

22. First, the Nicaraguans were detained on a farm — not a fish farm —, a farm of Gerardo Miranda-Alvarez not on the river. It is not true that the detention occurred on the San Juan River. Further, it appears they were not transported on the river at all. The report refers to them being picked up by "vehicle No. 711". The report consistently uses the term "vessel" to refer to boats, and "vehicle" to refer to motor vehicles. There is no reference to the San Juan in this extract, and no reference to anyone being transported by any means at "at gunpoint".

23. Mr. Reichler criticizes the affidavit of Mr. Navarro for failing to refer to the July 2000 aide-memoire annexed to the Rejoinder[201]. It will not have escaped the Court, but we have had to spend quite a lot of these oral arguments responding to evidence in the Rejoinder, which could, and should have been produced in the Counter-Memorial. And this is a further example. For his part the Nicaraguan Agent criticized the Court for allowing *any* further Costa Rican evidence after the repleaded Rejoinder[202]. By contrast Mr. Reichler — good trial lawyer that he is — wanted so *more and more* evidence[203]! The Court's response to our limited filing shows that we got the balance right.

24. Turning to the substance, I have already stated that there is no evidence that this aide-memoire of July 2000 was ever seen or approved by anyone from the Costa Rican side. Nicaragua did not produce any handwritten minutes of the meeting, any tape recording, which would have permitted verification of their authenticity and of any signatures, if indeed they were signed. Moreover, Mr. Reichler too hastily dismisses the Navarro affidavit: Mr. Navarro expressly states that after Nicaragua's prohibition of police navigation "in meetings with the Nicaraguan Army personnel, in which he personally participated" — we know from the record that the

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[200] CR 2009/5, p. 52, para. 22 (Reichler).

[201] RN, Ann. 68.

[202] CR 2009/4, p. 17, para. 38 (Argüello).

[203] CR 2009/5, pp. 47-48, para. 14.

July 2000 meeting was one of these — "it was *never* stated or anticipated that there existed an obligation or practice of requesting permission from the Nicaraguan authorities for the navigation of Costa Rican police on the San Juan River"[204]. The statement is clear and it refutes Colonel Molina's Minutes — or rather General Carrión's "authentication"[205] of Colonel Molina's Minutes.

25. Mr. Navarro's affidavit, supported by documentary evidence[206], puts into question the five Nicaraguan army affidavits filed late with Nicaragua's Rejoinder, which constitute the only evidence of the alleged "practice" of requesting prior authorization. In these circumstances, Nicaragua's claim that there was consistent practice on the San Juan of public vessels requesting authorization should be rejected.

(f) *Nicaragua has breached Costa Rica's rights of navigation with public vessels to deliver health, social and other essential services to the riparians of the Costa Rican bank*

26. My final point on this topic relates to the right of navigation to deliver essential health, social and other services to riparian communities on the Costa Rican bank. Mr. Reichler asserted that there was no such right of navigation[207]; but he said "Nicaragua does not . . . prohibit Costa Rica from navigating on the river for purposes of delivering medical, educational or other social services to Costa Rican citizens on the right bank of the river" all it requires is for vessels and officials to "register" and to "comply with applicable visa requirements"[208]. He dismissed the evidence of breaches as "bureaucratic inefficiencies" — apparently a new circumstance precluding wrongfulness — resulting in delays in the issuing of "some visas", in "isolated cases"[209].

27. In fact however Nicaragua *has* prohibited Costa Rica from navigating on the river for the purposes of delivering health, social, educational and security services to riparians. Costa Rica has produced evidence of this prohibition[210]. For example, Mrs. Laura Navarro, who works for a

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[204] CR Ann. IV to letter dated 27 November 2008, para. 5.

[205] CR 2009/5, p 49, para. 17 (Reichler).

[206] CR Ann. V to letter dated 27 November 2008.

[207] CR 2009/5, p. 55, para. 26 (Reichler).

[208] CR 2009/5, p. 54, para. 25 (Reichler).

[209] CR 2009/5, p. 55, para. 28 (Reichler).

[210] See, for example, MCR, Anns. 150, 52, 53, 166, 167, 168, 236, 237, 239, 98, 99, 100, 101; RCR, Anns. 45, 47, 55, 57, 56, 49.

social welfare agency in Costa Rica, states that Nicaragua imposed "a prohibition . . . upon Costa Rican public workers . . . navigating the San Juan River"[211]. Similarly Mr. Marvin Chaves, another social welfare worker, says that Nicaraguan authorities "requir[ed] that Costa Rican officials request *permission*" to visit Costa Rican communities[212]. The uncontroverted evidence of Dr. Ching is that the Nicaraguan Ambassador told her personally that she had to request "authorization to navigate on the San Juan River"[213]. Her evidence was filed in July 2008. In the circumstances it is, with respect, disingenuous to suggest that Nicaragua "does not . . . prohibit Costa Ricans from navigating on the river for the purposes of delivering medical . . . services", and that it only requires registration[214]. A demand for authorization entails a right to prohibit. The prohibition is quite separate from the issue of visas, which Professor Caflisch has dealt with.

28. Nicaragua's prohibition of this form of public navigation has had a detrimental effect on the provision of essential services. This is clear from Costa Rica's evidence, which states that "Primary Care activities" were suspended in communities close to the San Juan "due to the increasing restrictions on free navigation on the river"[215]. Costa Rican health workers attest that the services were suspended "due to the problems being encountered regarding navigation" and "with the purpose of protecting the physical integrity of the health workers . . ."[216]. They also attest to the effect on the local population: vaccinations cannot be provided to children, adults cannot receive basic health services[217], healthcare provided to persons in the region has in general been negatively affected[218].

29. This evidence cannot be dismissed as "bureaucratic inefficiencies which have resulted in delays in the issuance of some visas"[219]. What was provided to Dr. Ching was not a visa. It was

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[211] RCR, Ann. 57, p. 297.

[212] RCR, Ann. 56, p. 295 (emphasis added).

[213] RCR, Ann. 55, p. 292.

[214] CR 2009/5, p. 54, para. 25 (Reichler).

[215] MCR, Ann. 239, p. 1047. See also CRM, Anns. 236, 237, 98, 99, 100.

[216] MCR, Ann. 99, p. 527. See also CRM, Anns. 98 and 100.

[217] MCR, Ann. 100, pp. 531-532.

[218] MCR, Ann. 99, p. 527. See also RCR, Ann. 55, p. 292; Ann. 59, p. 304.

[219] CR 2009/5, p. 55, para. 28 (Reichler).

an "authorization . . . to navigate on the San Juan River"[220]. She was not applying for a visa, nor even for visas for the employees who were going to carry out the journey; she was compelled by the Nicaraguan Ambassador to apply for "authorization" for the programme itself[221]. Mr. Reichler alleges that since May 2007, Nicaragua has "expeditiously grant[ed] visas so that Costa Rican officials could deliver governmental services"[222]. Well first, this confuses the requirement of visas with the requirement of authorization for the programme. In Costa Rica's Reply, it was noted that in some cases Nicaragua had provided authorization within a reasonable time[223], but it was also noted that other requests had been ignored[224] and the practical effect of this was a prohibition on navigation by these government officials.

Fishing

30. Mr. President, Members of the Court, I turn — something I am not used to doing — to subsistence fishing, but after the raising of hens, I suppose fishing comes next. Professor Kohen has explained why the claim to subsistence fishing is admissible[225], and Mr. Reichler, while preserving Nicaragua's position on admissibility, did not respond to his arguments at all[226]. As to the substance of the claim, Mr. Reichler said that Nicaragua had not prohibited subsistence fishing on the river and that Nicaragua "has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities"[227] — has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities. He stressed, however, that commercial including sport fishing is not permitted[228]. So there are three points. As to the first — the facts — we produced affidavit evidence that fishing by riparians has been prohibited and that

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[220] CMN, Ann. 53, p. 193.

[221] CMN, Ann. 51, p. 189.

[222] CR 2009/5, p. 55, para. 28 (Reichler).

[223] RCR, paras. 4.36-4.37.

[224] CRR, Anns. 49 and 56; CRR, paras. 4.34-4.36.

[225] CR 2009/3, pp. 55-57, paras. 13-22 (Kohen).

[226] CR 2009/5, p. 27, para. 48 (Reichler).

[227] *Ibid.*

[228] *Ibid.*

boats and tackle have been confiscated[229]. As to the second, if you decide there is an admissible dispute, we ask the Court, in its *dispositif*, respectfully, to record and give effect to Nicaragua's stated position that subsistence fishing by riparians, whether from the Costa Rican bank or from boats on the river, will not be impeded. As to the third point, Costa Rica has never claimed — and does not claim — a right to commercial fishing or sport fishing on the river and we have no objection that this be made clear in the judgment.

Remedies

31. Mr. President, Members of the Court, I dealt with remedies in my abbreviated speech in the first round[230]. Professor Pellet in his unabbreviated speech on Friday did not say much that requires a response. We agree on the need for the Court by way of a clear declaratory judgment to spell out the respective rights and obligations of the Parties in so far as they are in dispute before the Court[231]. Where we do not agree is that Nicaragua apparently persists in seeking a declaration on hypothetical matters not presently in dispute — such as dredging[232]. Nicaragua's right to dredge is as set out in the Cleveland Award in response to the sixth point of doubtful interpretation[233]. Whether any particular dredging programme meets Cleveland's conditions will depend on its scope, scale and modalities. Presently there is no proposal for dredging and the matter is entirely hypothetical. This is not, you will be relieved to know, an advisory opinion.

32. Turning to what Professor Pellet persists in calling injunctions[234], obviously the Court does not issue injunctions in the domestic law sense; it issues orders, often very clear and specific, which are binding on the States parties to the case. I would simply and respectfully request the Court not to allow any room for backsliding in the terms of the provisions of the *dispositif*. On the subjects in dispute the Parties need to know exactly where they stand, so there can be no excuse for non-performance, no new circumstance precluding wrongfulness, so they can — more happily than

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[229] On Nicaragua's established fishing prohibition, see the following affidavits: MCR, Anns. 106, 107, 108, 109; RCR, Ann. 54, and the Press notes at RCR, Ann. 59. On the confiscation of fishing gear, boats and fish see MCR, Anns. 105, 106, 107, 109; RCR, Anns. 54 and 59.

[230] CR 2009/3, pp. 63-70, paras. 1-28 (Crawford).

[231] CR 2009/5, p. 57, para. 3 (Pellet).

[232] CR 2009/5, p. 59, para. 6 (Pellet).

[233] MCR, Ann. 16, p. 99, numbered para. 6.

[234] CR 2009/5, p. 61, para. 15 (Pellet).

in recent decades — co-exist on the river which marks for a substantial distance their common border.

33. Mr. President, Members of the Court, there being nothing I can usefully add on damages, it remains to thank you for your courteous attention during this case, and to ask you, Mr. President, to call on Costa Rica's Agent to present our final remarks and submissions.

The PRESIDENT: Thank you, Professor Crawford, for your presentation. I now give the floor to the Agent of Costa Rica, Ambassador Edgar Ugalde to present his closing remarks.

Mr. UGALDE-ALVAREZ:

V. CLOSING REMARKS

1. Mr. President, distinguished Members of the Court, Costa Rica has come to the end of its oral pleadings. It is my task to draw our final conclusions for the Court as well as to state Costa Rica's submissions. However, before I turn to these final points, I will refer briefly to various misstatements made by Nicaragua in its oral pleadings.

2. (Tab 69 of the judges' folder) First, let me say again that Costa Rica does not possess military forces. The chart presented by Nicaragua last Thursday[235], apparently showing Costa Rican "military" expenditure, is referenced from a website[236] which bases the information on the CIA's *World Factbook*[237]. It should be noted that Nicaragua omitted expenditure on its police forces and only included expenditure on its military forces. Costa Rica rejects the assertion that the amounts depicted correspond to Costa Rican "military expenses". As a matter of fact, the CIA source cited from the website clearly indicates that Costa Rica does not possess military forces[238]. If Nicaragua's total police[239] and military expenditure was considered, as should have been the case, then in absolute terms Nicaragua's expenditure on security is nearly $100 million!, about a fifth more than Costa Rica's, despite large discrepancies between the GDP of both countries.

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[235] CR 2009/4, p. 12, para 18 (Argüello).

[236] See http://www.militarybudget.info/WorldwideSpending.html.

[237] See https://www.cia.gov/library/publications/the-world-factbook/.

[238] See https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html.

[239] See http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

Furthermore, as you can see in the graphic projected, the chart there shows that Nicaragua's expenditure, both in real terms[240] and as a percentage of GDP[241], is much higher than Costa Rica's (tab 70 of the judges' folder).

3. In addition, the recent Human Development Report[242] prepared by the United Nations Development Programme states that Costa Rica has zero, I repeat, zero military expenditure for the period between 1990 and 2005.

4. Secondly, the reference made by Nicaragua to its 1986 Application to the Court[243] cannot and should not have any weight in the present proceedings. As Nicaragua has pointed out, that case was discontinued by it in 1987, before Costa Rica had any opportunity to respond to Nicaragua's Memorial, let alone appear before this Court[244]. In any case, Costa Rica emphatically rejects all allegations that may have been made by Nicaragua there.

5. Nicaragua seems satisfied to use the Court's valuable time to fashion new fields of conflict, because that is precisely what it does by stating that Costa Rica has not reacted to other problems, such as environmental issues as a result of mining operations or the settlement of maritime boundaries[245]. It must be said that these issues fall entirely outside the dispute before the Court in the present case. In this context, however, Costa Rica expects to soon receive the relevant documents pertaining to Nicaragua's planned hydroelectric dam on the San Juan River[246], with indications of its possible environmental impact on the river and both riparian States. Costa Rica is also hopeful that Nicaragua will finally decide on the date when the maritime delimitation talks, which were unilaterally suspended by it in 2005, could be resumed.

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[240] See tab 69 of the judges' folder. Information derived from http://www.militarybudget.info/WorldwideSpendin`g.html; https://www.cia.gov/library/publications/the-world-factbook/index.html; and http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

[241] See tab 70 of the judges' folder. Information derived from http://www.militarybudget.info/WorldwideSpendin`g.html; https://www.cia.gov/library/publications/the-world-factbook/index.html; and http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

[242] See http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

[243] CR 2009/4, p. 15, para. 29 (Argüello).

[244] CR 2009/2*, p. 12, para. 1 (Ugalde-Alvarez).

[245] CR 2009/4, pp. 16-17, paras. 32-34 (Argüello).

[246] See http://www.elnuevodiario.com.ni/imprimir/41417; http://www.telesurtv.net/noticias/secciones/nota/43824-NN/nicaragua-y-brasil-firman-acuerdo-sobre-plan-hidroelectrico/.

6. Nicaragua insists on censuring Costa Rica for enforcing its immigration laws in Costa Rica's own territory. As has been shown to the Court, Nicaragua has misrepresented evidence related to this issue[247]. However, I would like to respond to Nicaragua's allegation that in 1998 Costa Rica's Government engaged in a new policy in response to what was perceived as increased Nicaraguan illegal immigration to Costa Rica[248]. It has been shown that these allegations are not true[249]. As a matter of fact, it was that Administration that enacted in 1998 the largest immigration amnesty in Costa Rican history[250], which effectively allowed some 150,000 Nicaraguans to legalize their situation in Costa Rica.

7. Finally, Nicaragua's Agent found it appropriate to announce before the Court that, for the first time in over 150 years, it is disputing issues regarding the situation of the common Bays of San Juan and Salinas[251]. Is Nicaragua disposed to challenge, once again, the final and perpetual character of the 1858 Treaty of Limits, along with the *res judicata* character of the 1888 Cleveland Award?

8. Costa Rica has come to the International Court of Justice, as I said, as a last resort to definitively settle the way in which it can effectively enjoy its rights of free navigation on the San Juan River[252]. The river has an exceptional régime which is reflected in the number of instruments and decisions that relate to it, in particular the 1858 Treaty of Limits, the 1888 Cleveland Award, the 1916 judgment of the Central American Court of Justice and the 1956 Agreement. We trust that the Court will view this régime in its entirety and will find it, along with the evidence submitted, to fully support Costa Rica's submissions.

9. Therefore, we trust that the Court will find that Costa Rica indeed possesses the rights of navigation for purposes of commerce that the instruments have granted it. The clarity of your decision is of great importance, so that Costa Rica and Nicaragua will be able to recognize that children may navigate freely to school, that mothers and their children can have effective access to

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[247] CR 2009/2, p. 27, para. 12 (Ugalde). See also CR 2009/6, pp. 50-64 (Crawford).

[248] CR 2009/5, p. 51, para. 21 (Reichler).

[249] CR 2009/2*, pp. 25-27, paras. 7-13 (Ugalde).

[250] See http://www.unhcr.org/refworld/publisher,NATLEGBOD,,CRI,3ae6b560c,0.htm

[251] CR 2009/4, p. 17, para. 35 (Argüello).

[252] CR 2009/2*, p. 14, para. 9 (Ugalde-Alvarez).

health and social services, that tourists may be transported without being searched and subjected to *ad hoc* measures, and that police protection can be brought to communities. It is equally important for the State of Costa Rica to fully exercise its rights and obligations, including the protection and guarding of the San Juan River and the Bay of San Juan del Norte, which is commonly owned by both countries, as well as that of Salinas. It is our hope that these rights, shall they be found to belong to Costa Rica, be enjoyed in such a manner that they are effective and meaningful, free from constant and aggravating interference. The people of Costa Rica wish nothing more than peaceful and friendly relations with their neighbours, but they also desire that the rule of international law be upheld and fully respected.

Submissions

10. Mr. President, pursuant to Article 60 of the Rules of Court, I shall now read the final submissions of the Republic of Costa Rica.

Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that the Republic of Nicaragua has:

(a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the river;

(c) the obligation not to require persons exercising the right of free navigation on the river to carry passports or obtain Nicaraguan visas;

(d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the river;

(e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of resupply and exchange of personnel of the border posts along the right bank of the river with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second Article of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes.

11. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

12. The Court is requested to reject Nicaragua's request for a declaration.

13. Mr. President, distinguished Members of the Court, the Government and the people of the Republic of Costa Rica express their gratitude to the Court for the opportunity given to Costa Rica to be heard. May I also offer our thanks to the Court's Registry and to the team of interpreters and translators for their excellent work. Costa Rica reaffirms its full confidence in the Court and expresses its acceptance of the judgment to be found. This judgment should serve to allow both countries to build a fraternal and peaceful future. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Ambassador Edgar Ugalde. The Court takes note of the final submissions which you have now read on behalf of the Republic of Costa Rica. The

Republic of Nicaragua will present its second round of oral argument on Thursday 12 March from 10 a.m. to 1 p.m. This sitting is now adjourned until Thursday.

The Court rose at 1 p.m.

CR 2009/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Thursday 12 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua)**

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le jeudi 12 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire du* Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)**

COMPTE RENDU

Present: **President** **Owada**
Judges **Shi**
Koroma
Al-Khasawneh
Buergenthal
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Judge *ad hoc* **Guillaume**

Registrar **Couvreur**

The Government of the Republic of Costa Rica is represented by:

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as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

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Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

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Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to hear the second round of oral argument of the Republic of Nicaragua. I now give the floor to Mr. Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

I. A REAFFIRMATION OF THE SPECIAL CHARACTER OF THE TREATY

1. Mr. President, distinguished Members of the Court, it is my task to respond to the presentations of my friends on the other side of the Court relating to the general character of the Treaty of Limits and the nature of the legal interests which result from that Treaty.

2. Before examining the observations of Professors Crawford and Caflisch individually, I must point to the weak analytical foundation common to both speeches. Both fail to give full faith and credit to the sovereignty of Nicaragua, that is to say, Nicaragua's title to the river as a whole. This legal interest, this title to territory, is not created by the Treaty but is the result of the determination of the boundary. The legal result of the fixing of the international boundary is the existence of a title to territory.

3. It is a consequence of two elements in combination:

— *First*, the implementation of the territorial settlement by means of fixing a boundary which allocated the extensive region of Nicoya to Costa Rica, and the region of the San Juan River to Nicaragua.

— *Second*, the necessary result, in general international law, was the establishment of title for Nicaragua.

4. Mr. President, counsel for Costa Rica insist on treating title or sovereignty as if it is divisible into several layers of jurisdictional rights, of navigation, of communication, and so forth.

5. What is missing here is the qualitative difference between title and the regulatory power which goes with title on the one hand and, on the other hand, the entitlement to treaty rights on the part of another State, rights which can only be vindicated by claim, and by methods of peaceful settlement. Because Nicaragua is the territorial sovereign, the title holder, she has not only the

legal power but the legal duty to maintain public order and appropriate conditions of safe navigation on the San Juan.

6. It is this basic condition, this basic system of public order which is recognized in the decision of the Claims Commission in the *McMahon* case. The system depends upon the principle that the power of control and decision inheres in the sovereign, and the question is, who has that power? The answer is Nicaragua and not Costa Rica. The Treaty provisions are administered by the territorial sovereign.

7. My outline of this system of public order, that is, the maintenance of the discipline of the Treaty, provoked Professor Crawford to refer to the outline as an extraordinary statement. But, Mr. President, if Professor Crawford did arrive at the local market of Sarapiqui with his eggs still unbroken, and ready for sale, this would be the result of the system of public order which he finds extraordinary.

8. Both Professor Crawford and Professor Caflisch share the same confusion concerning the coexistence of certain rights and the regulatory powers of the State with title to territory.

9. This confusion is apparent in the conclusions proposed to the Court by Professor Caflisch (CR 2009/6, p. 40, para. 13).

10. First, he says that the instrument of 1858 is a treaty establishing a boundary with a multifaceted legal régime governing a waterway. This formulation involves a failure to draw the legal conclusions from the establishing of a boundary, especially, one which constitutes the settlement of a major territorial dispute.

11. Secondly, he says that sovereignty and the right of navigation are "pieces of one and the same picture" and that it cannot be said that the one dominates the other. This formulation encapsulates the recurrent failure of our opponents to distinguish between the question of rights and the enforcement and protection of those rights.

12. In fact in his third conclusion Professor Caflisch recognizes that Nicaragua can "exercise her sovereignty via measures and regulations" that are not unlawful, discriminatory or unreasonable. This, Mr. President, is a belated acceptance of the system of public order created by the Treaty and by general international law.

13. I have now addressed the false premises on which the reasoning of Costa Rica concerning sovereignty rests, and I can now return to some of the specifics of the submissions of Professor Crawford.

14. It will be of assistance to the Court if I first of all indicate what Professor Crawford did not deal with in response to my first round speech.

15. First, he steers clear of the doctrine of contemporary international law. And it is not the case that Professor Crawford has left this aspect of the matter to his colleague, because Professor Caflisch shows a similar reticence when it comes to the doctrine. Professor Caflisch confines his response to say that "Mr. Brownlie has cited a number of authorities to establish that there is no general right or freedom of river navigation in Latin American practice" (CR 2009/6, p. 40, para. 15). Professor Caflisch accepts this position and so, presumably, does Professor Crawford.

16. And this is all highly relevant because it emphasizes that the Treaty provisions on navigation are exceptional and form an inherent element in the territorial settlement.

17. I must return to the reticences of Professor Crawford.

18. As I have pointed out, he avoids reference to doctrine *tout court* .

19. Secondly, he avoids reference to third State evidence, including the Note dated 28 May 1858 from Mr. Mirabeau B. Lamar to the United States Secretary of State. Mr. Lamar recognized the extent of the territorial concession made by Nicaragua. The Court will recall that he was the United States Resident Minister to the Governments of Costa Rica and Nicaragua.

20. *Thirdly*, Professor Crawford plays down the evidence that the 1858 Treaty involved the settlement of a long-running territorial dispute between Costa Rica and Nicaragua. The relevant paragraphs of the first Rives Report, cited in my first speech, are not rebutted. Moreover, the wording of the preamble to the Treaty of Limits is ignored, along with the provisions of Article I, which explicitly indicate the historical background.

21. Fourthly, Professor Crawford leaves on one side the whole question of the legal consequences of the existence of Nicaraguan title over the San Juan as a result of the 1858 Treaty.

22. I move on to the thesis of Professor Crawford according to which the Nicoya theory is wrong and, he says, in any event irrelevant (CR 2009/6, pp. 12-14, paras. 16-26).

23. Counsel for Costa Rica makes heavy going of this issue. The documents show that the question of title to Nicoya remained open until the Treaty of 1858. The Memorial of Costa Rica expressly recognizes that the question of Nicoya was not finally settled until the 1858 Treaty; I refer to the Memorial, page 12, paragraph 2.14. And the position was confirmed by the first article of the Juarez-Cañas Treaty of 1857.

24. If Professor Crawford were correct about the history, the 1858 Treaty would have been unnecessary.

25. Professor Crawford raises questions about the extent of Nicoya (CR 2009/6, p. 12, paras. 17-18). Nicaragua stands by the map published by Fermin Ferrer, but would adopt the same argument as before on the basis of the judges' folder for round 2, tab 53. This is said to be the representation of Nicoya as described by Rives. This version still presents Nicoya as very extensive, and including the southern coast of Lake Nicaragua. Thus, it still indicates the subject-matter of a substantial territorial dispute.

26. Professor Crawford's final point is to the effect that "the obvious purpose of the Treaty" was the interoceanic canal (CR 2009/6, pp. 14-15, paras. 27-30). No doubt the Treaty had many aspects but Nicaragua does not accept that the object and purpose of the 1858 Treaty was not the settlement of the long-standing territorial dispute but "the interoceanic canal". It is true that Article VIII of the Treaty contemplated the possibility of a canal. At the same time it would be astonishing to see the Treaty itself as an interoceanic treaty.

27. And in respect of the issue of natural rights raised in the second Rives Report, it is true that Point 11 of Cleveland's Third Article refers to "cases where the construction of the canal will involve an injury to the natural rights of Costa Rica . . ." and provides then that Costa Rica may "demand compensation".

28. I shall move now to the decision of the Permanent Court in the *S.S. "Wimbledon"* case, in which the Judgment used the phrase "general and peremptory" in relation to Article 380 of the Treaty of Versailles. This was invoked by Professor Crawford in the second round (CR 2009/6, pp.8-9, para. 3).

29. Professor Crawford accepts that the Treaty of Versailles has a distinct character from the 1858 Treaty, which was "general and peremptory", whilst the latter — the bilateral Treaty of

1858 — is "bilateral rather than general". But he nonetheless considers it to be relevant. With respect, this reliance on the *S.S. "Wimbledon"* decision displays excessive optimism. The case could not be more different from the present. The context is the multilateral peace treaty of Versailles and the refusal of access to the Kiel Canal by the German authorities on the basis of obligations of neutrality. And so the circumstances were unusual in several respects. In the words of the Permanent Court:

> "The Court considers that the terms of Article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany." (*Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 22-23.)[1]

30. Mr. President, in the result, the Permanent Court is deciding that Germany could not invoke the law of neutrality and that is peremptory indeed. But the subject-matter has no relevance for the present case. The strange result, however, is that at the end of the day Costa Rica appears to espouse the categorization of the right of navigation as peremptory. And yet when Nicaragua described the Costa Rican analysis as involving a peremptory right of navigation, counsel for Costa Rica protested. I refer to the argument of Professor Caflisch in the second round (CR 2009/6, p. 40, para. 15).

31. I return to some specific points raised in the presentation of Professor Caflisch (CR 2009/6, p. 41, para. 16). He refers to the decision of the General Claims Commission in the case of *McMahan*. He quotes a passage already included in the transcript (CR 2009/4, p. 32, para. 59) but does not deny the relevance and authority of the decision itself. The decision adopts the basic system of public order which I have already outlined this morning.

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[1] "La Cour estime que l'article 380 est formel et ne prête à aucune équivoque. Il en résulte que le canal a cessé d'être une voie navigable intérieure, nationale, dont l'usage par les navires des Puissances autres que l'Etat riverain est abandonné à la discrétion de cet Etat, et qu'il est devenu une voie internationale, destinée à rendre plus facile, sous la garantie d'un traité, l'accès de la Baltique, dans l'intérêt de toutes les nations du monde. Sous son régime nouveau, le Canal de Kiel doit être ouvert, sur le pied de l'égalité, à tous les navires, sans qu'il y ait à distinguer entre les navires de guerre et les navires de commerce, mais à une condition expresse, c'est que ces navires ressortissent à des nations en paix avec l'Allemagne."

32. My distinguished opponent also states that "a treaty right to free navigation cannot be regulated out of existence by invoking Nicaragua's sovereignty" (CR 2009/6, pp. 40-41, para. 15). And he adds: "This observation is also valid for the passages quoted from Wheaton and O'Connell."

33. These statements involve tilting at windmills and the Court certainly is in a setting appropriate for such sport. In any event, Wheaton and O'Connell do not support the position of Costa Rica. The relevant passages appear in my first round speech at paragraphs 55 to 57 (CR 2009/4, p. 31). Both Wheaton, published in 1866, and O'Connell, published in 1970, accept that any right of navigation is subject to the regulatory power of the riparian State.

Mr. President, I have now concluded my submissions in the second round and I thank the Court for its kind attention. I would ask you now to invite Professor Remiro to the podium.

The PRESIDENT: Thank you, Mr. Brownlie, for your presentation. I now give the floor to Professor Remiro Brotóns.

M. BROTÓNS :

II. LE DROIT DE LIBRE NAVIGATION DU COSTA RICA «CON OBJETOS DE COMERCIO» SUR UN TRONÇON DU FLEUVE SAN JUAN

1. Introduction

1. Monsieur le président, Messieurs les juges, c'est dans les arbres de la ville d'Olivabassa, née de l'imagination fertile d'Italo Calvino, que le baronnet Cósimo de Piovasco se promenait sans jamais toucher le sol et c'est là qu'il rencontra, un jour, une colonie d'aristocrates espagnols en exil, qui vivaient également perchés dans les bananiers et les ormes de la ville. Pourquoi ? Parce que les magistrats locaux, qui voulaient leur donner refuge, se devaient néanmoins de respecter l'ancien traité conclu avec le roi d'Espagne, en vertu duquel ils étaient tenus de lui extrader tout fugitif *posant son pied sur le sol* d'Olivabassa[2].

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[2] I. Calvino, *Il barone rampante*, 1957 ; trad. française : *Le baron perché*, 1959 (voir Ed. du Seuil, Collection Points, n° 232, Paris, 2001) ; trad. anglaise : *The Baron in the Trees*, 1959.

2. Eh bien, Monsieur le président, Messieurs les juges, c'est cela que vous propose maintenant le Costa Rica, en défendant une décision *policy-oriented* en vue de laquelle la Partie demanderesse n'a aucun scrupule à manipuler le canon d'interprétation codifié dans l'article 31 de la convention de Vienne. Mais, êtes-vous les juges d'Olivabassa ?

2. *Reductio ad absurdum* et principe de bonne foi

3. Lundi dernier, les conseils du Costa Rica ont tenté, dans un ultime effort, de vous convaincre d'accepter leurs prétentions tout à fait dépourvues de fondement, réduisant les conclusions auxquelles une application correcte de la *règle générale* d'interprétation conduit naturellement à l'absurde.

4. Les conseils du Costa Rica nous parlent de paysans qui se déplacent avec leurs œufs au marché de Sarapiquí et qui ne peuvent retourner chez eux parce qu'ils les ont tous vendus[3], ou encore d'un producteur du café obligé de faire le tour du cap Horn alors que sa récolte prend la route du San Juan vers l'Europe[4]. Ils affirment avec désinvolture que l'expression *objetos de comercio* contenue dans l'article VI du traité Jerez-Cañas a pour objet de clarifier et d'étendre le droit perpétuel de libre navigation accordé sans limites au Costa Rica[5]. Tout en accusant le Nicaragua de vouloir remplacer l'interprétation résultant de la *règle générale* par une interprétation fondée sur les moyens complémentaires[6], les conseils du Costa Rica font prévaloir le rapport de Rives sur le texte du traité[7].

5. Monsieur le président, Messieurs les juges, c'en est assez ! L'opération interprétative menée par le Costa Rica est difficilement compatible avec le principe de bonne foi, principe essentiel dans la *règle générale* d'interprétation. Il est évident que les bateaux destinés au transport de marchandises ne changent pas leur qualification quand, une fois leurs marchandises déchargées au port, ils naviguent sur lest. Tous n'ont pas forcément de charge pour leur voyage de retour et certains comme les pétroliers ou les navires qui transportent du gaz liquide ou des déchets

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[3] CR 2009/6, p. 17, par. 35.

[4] CR 2009/6, p. 31, par. 43.

[5] CR 2009/6, p. 17, par. 34.

[6] CR 2009/2, p. 73, par. 63.

[7] CR 2009/6, p. 15, par. 29.

dangereux naviguent en général à vide au retour. Et il va de soi que les commerçants peuvent accompagner leurs marchandises.

6. Le Costa Rica s'obstine à proposer une interprétation de son droit de navigation qui prive la limitation de le faire «con objetos de comercio» de tout effet ; il soutient que son droit de navigation est plus que libre, absolu. Néanmoins, même la traduction anglaise de l'article VI du traité Jerez-Cañas chérie par le Costa Rica limite ce droit de navigation costa-ricien : «said navigation being for the purposes of commerce». Il est donc évident qu'on ne peut soutenir sérieusement que les objets de commerce sont une extension du droit de navigation illimitée. Toutes les références au droit de navigation dans le traité reposent, expressément ou implicitement, sur le texte de l'article VI et sa limitation «con objetos de comercio».

3. Une navigation «con objetos de comercio»

7. Monsieur le président, Messieurs les juges, nous avons déjà longuement débattu sur la signification du syntagme «objetos de comercio»[8].

8. Conformément au sens ordinaire des termes dans le contexte du traité, le Nicaragua croit avoir démontré que naviguer «con objetos de comercio», c'est bien naviguer «avec les choses qui font l'objet d'une activité commerciale», c'est naviguer avec des marchandises. Mais même dans l'hypothèse où la Cour considèrerait que l'article VI du traité Jerez-Cañas se réfère, sous couvert de cette expression, aux finalités commerciales, le résultat ne changerait pas pour autant, car à l'époque où le traité a été conclu, le commerce n'était rien d'autre que le trafic de marchandises.

9. La Partie adverse n'a pas avancé lors du deuxième tour de ses plaidoiries des éléments ou raisonnements qui nous obligent à modifier notre position. Cependant, si vous me le permettez, je souhaite faire des brefs commentaires à propos de certaines questions reprises par le Costa Rica lundi dernier.

10. La première concerne les tableaux présentés par le Costa Rica afin de prouver que l'expression «objetos de comercio» signifie «fins commerciales» et que le trafic commercial est décrit par d'autres termes quand on veut se référer aux marchandises.

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[8] CR 2009/4, p. 37-40, par. 6-15.

11. Le Nicaragua croit avoir discrédité la valeur probante de ces tableaux[9]. Il y a bien sûr d'autres termes utilisés dans le trafic commercial pour identifier les choses impliquées dans l'activité commerciale et qui sont, peut-être, utilisés dans le trafic commercial plus fréquemment que celui de «objetos». Mais, si nous nous en tenons au critère du Costa Rica[10], les «commodities» ne seraient pas des «commodities», car elles n'apparaissent pas une seule fois dans la liste que le Costa Rica lui-même a établie. Or, ce terme de «commodities» ne fait-il pas partie des termes les plus populaires, et donc des plus courants, de la langue commerciale anglaise ?

12. La signification du terme «objeto» au singulier (et il en est d'ailleurs de même au pluriel), dépend du contexte dans lequel il est utilisé. Il s'agit d'un terme polysémique dont on ne peut déterminer le sens que grâce à son contexte.

13. Citons, à titre d'exemple, cette définition d'opérations liées au commerce tirée du *Corpus diachronique de l'espagnol actuel*. Il s'agit «d'opérations indépendantes, qui ont *pour objet* de faciliter l'achat et la vente des *objets de commerce,* ou de servir de médiation dans ce type d'affaires»[11]. Et voila ! Nous trouvons là, dans la même phrase, «objet» comme finalité et «objets de commerce» comme marchandise.

14. C'est pourquoi on ne peut tirer aucune conclusion basée sur l'interprétation de ce terme hors de son contexte ; dans notre cas, il s'agit bien d'objets de commerce («objetos de comercio»). Et c'est bien là ce que le Nicaragua met en question : le sens que le Costa Rica donne à des *objets* au pluriel quand ces *objets sont liés au commerce et qu'on prétend naviguer avec eux*.

15. Pourquoi l'expert du Costa Rica, M. Moreno de Alba, passe-t-il sous silence tous les cas du syntagme «objetos de comercio» que recense le *Corpus diachronique*, ouvrage qu'il connaît et qu'il invoque à l'appui d'autres points ? La réponse est bien simple : parce que, dans tous les cas, le syntagme «objetos de comercio» est compris au sens de «choses faisant l'objet d'activités commerciales»[12].

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[9] CR 2009/4, p. 40-44, par. 16-27.

[10] CR 2009/6, p. 25, par. 18-20.

[11] Dossier de plaidoiries, 5 mars 2009, plaidorie de M. Antonio Remiro Brotons, liste de documents, document 1 : CORDE «objetos de comercio».

[12] CR 2009/6, p. 39, par. 15.

16. En outre, le seul point qui pourrait appuyer l'interprétation finaliste du syntagme «objetos de comercio» que propose le Costa Rica se trouve dans les traités qui ont suivi le modèle du traité Jay ; rappelons que ces traités, conclus par le Costa Rica avec les Etats-Unis en 1851 et par le Nicaragua en 1857, 1859 et 1867, se réfèrent au droit des citoyens des parties à «louer et occuper des maisons et des entrepôts *para los objetos de su comercio (for the purpose(s) of their commerce)*», une fois énoncé leur droit «to come with their Ships and Cargoes to the Lands, Countries, Cities, Ports Places and Rivers within their Dominions and Territories» [13].

17. Le terme «objets» dans l'expression «para los objetos de su comercio» peut donc être interprété tant au sens de «choses» ou «marchandises» qu'au sens de «fins commerciales». L'expert du Costa Rica lui-même admet l'ambigüité du texte[14]. A notre avis la seule raison pour donner *dans ce cas* un certain crédit à la seconde interprétation réside dans le fait qu'elle a été traduite par «for the purposes of commerce» dans le texte anglais du traité, qui fait également foi. Mais eu égard au contexte des dispositions mentionnées, les activités commerciales portent sur des cargaisons, c'est-à-dire, sur des marchandises qu'on emmagasine dans les entrepôts, ce qui renvoie à nouveau au seul commerce des marchandises.

18. Monsieur le président, Messieurs les juges, il y a des différences significatives entre ces traités et le traité Jerez-Cañas. Ce dernier est un traité portant sur des limites territoriales et non un traité d'amitié, de commerce et de navigation comme les autres. Il ne repose pas sur un modèle. On y parle de navigation *avec* des objets de commerce et non de louer des entrepôts *pour* les objets de commerce. Le traité Jerez-Cañas fait autorité seulement en espagnol. Le traité Jerez-Cañas est singulier, absolument singulier.

19. Le conseil du Costa Rica triomphe parce que dans aucun des huit cas citant «objetos de comercio» mentionnés dans le *Corpus diachronique de l'espagnol actuel*, tous avec une signification indubitable de «choses faisant l'objet d'activités commerciales», la préposition «con» précède le syntagme, telle qu'elle figure à l'article VI du traité[15]. Cela n'affecte pas l'interprétation

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[13] CR 2009/4, p. 41-42, par. 21-25.

[14] J. G. Moreno de Alba, *Dictamen sobre el significado del sintagma «con objetos de comercio» en el contexto del artículo 6° del «Tratado de límites entre Costa Rica y Nicaragua» (14 de abril de 1858)*. 9 de noviembre de 2008, par. III.3 (Documents Annexed to Letter from Agent of Costa Rica dated 27 November 2008, Ann. I).

[15] CR 2009/6, p. 22, par. 11.

de l'expression[16], mais, pour les besoins de la démonstration, peut-on trouver un seul cas dans le tableau présenté par le Costa Rica dans lequel la préposition «con» précède le terme «objetos» ? La réponse est clairement *non*. En fait, on peut dire que la formule de l'article VI nous met devant un *hapax*, c'est-à-dire, un cas unique, sans aucune confirmation : le syntagme «con objetos de» plus un substantif («commerce» dans notre cas) ne correspond à aucune pratique qui soit connue[17].

4. La notion de *comercio* (commerce) vers le milieu du XIX^e^ siècle

20. Dans le contexte du milieu du XIX^e^ siècle, «commerce» visait le trafic de marchandises. Le Nicaragua croit que ce fait a été bien établi et démontré avec les arguments exprimés au premier tour de ses plaidoiries[18]. La preuve grammaticale et la pratique conventionnelle confirment cette affirmation.

21. Le Costa Rica admet que tel était le cas, mais il insiste sur la deuxième acception de «commerce» au XIX^e^ siècle, défini comme «communication et relations de groupes de personnes et de peuples avec d'autres»[19]. Certes ! Mais le Costa Rica n'explique pas comment cette acception pourrait, d'une manière ou d'une autre, être retenue dans le texte et le contexte de l'article VI du traité Jerez-Cañas et pourrait conduire à écarter la première définition du commerce communément acceptée.

22. L'acception du terme commerce promue par le Costa Rica est aujourd'hui reléguée à la huitième et dernière acception du *Dictionnaire* et est, d'ailleurs, comme je l'ai signalé en passant au premier tour, tombée en désuétude[20]. Il n'y a pas de contradictions parmi les conseils du Nicaragua sur ce point. Le Nicaragua ne prétend pas tirer profit du fait que cette acception, toujours secondaire, est aujourd'hui obsolète, si ce n'est pour attirer l'attention sur l'intérêt que lui porte le Costa Rica, soucieux de relier à l'acception la plus large du mot «commerce» des

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[16] Voir M. Seco Reymundo, *Dictamen sobre el sintagma «con objetos de comercio» en el texto del Tratado de Limites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858*, par. 6 (duplique du Nicaragua (DN), vol. II, annexe 64).

[17] Voir M. Seco Reymundo, *Dictamen*..., par. 8.

[18] CR 2009/4, p. 43-46, par. 28-42.

[19] CR 2009/6, p. 30, par. 30.

[20] CR 2009/4, p. 44, par 35.

développements bien plus récents, qui n'étaient pas imaginables pour les auteurs du traité Jerez-Cañas en 1858.

23. Comprendre le mot «commerce» dans le cadre de l'article VI du traité comme «communication et relations de groupes de personnes et de peuples avec d'autres» équivaut à faire de commerce un synonyme de «communication». Cependant, le commerce présume la communication, mais ne se confond pas avec elle, à moins qu'une intention contraire puisse être démontrée.

24. En résumé, c'est la première acception de commerce qui exprime le mieux le sens commun et courant du terme et il n'y a dans le traité aucune indication qui permettrait une acception différente. Force est donc de s'en tenir à cette première acception.

5. Le transport de passagers

25. Monsieur le président, Messieurs les juges, le conseil du Costa Rica estime avoir fourni la preuve que le transport de passagers est compris dans le droit de libre navigation découlant de l'article VI du traité Jerez-Cañas[21]. Mais où se trouve-t-elle — la preuve ? Contrairement à ce que soutient le Costa Rica, le transport de passagers est exclu de la notion de commerce au milieu du XIX^e^ siècle et, en particulier, de la notion de commerce retenue par l'article VI du traité.

26. Tout d'abord, le commerce est défini comme «négociation et trafic qui se fait en achetant, en vendant, en échangeant des choses» ; c'est la première acception du terme dans tous les dictionnaires pendant tout le XIX^e^ siècle et encore aujourd'hui[22]. Mais elle est d'autant plus intéressante qu'aucune des autres acceptions de commerce, qui incluent même deux jeux de cartes, ne fait la moindre allusion au transport de passagers.

27. En second lieu je rappelle la position du Costa Rica lui-même dans l'arbitrage Cleveland[23], déjà évoquée par le Nicaragua au premier tour[24] et sur laquelle reviendra tout de suite mon collègue, le professeur Pellet : dans sa question «rhétorique» le demandeur se référait expressément au «transport de marchandises» à l'exclusion de celui des passagers.

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[21] CR 2009/6, p. 31, par. 41.

[22] CR 2009/4, p. 43, par. 29-30.

[23] DN, vol. II, annexe 5.

[24] CR 2009/4, p. 58-59, par. 20-21 ; CR 2009/5, p. 31-32, par. 13.

28. En troisième lieu, il faut rappeler que si durant une période remontant à 1849 des passagers ont, en effet, été transportés en grand nombre sur le fleuve, cette pratique était le fait du Nicaragua, mais en aucune manière celle du Costa Rica. Si le Costa Rica avait un droit quelconque au transport de passagers sur le fleuve San Juan, on ne peut que s'étonner qu'il n'en ait fait aucun usage pendant plus de cent trente ans. Ce n'est qu'à partir de 1994 que le Costa Rica s'est aventuré à promouvoir un tourisme régulier et important sur le San Juan. Auparavant, le Nicaragua n'avait nul besoin de rappeler au Costa Rica ce que «objetos de comercio» signifiait dans le traité.

29. En quatrième lieu, et comme le Nicaragua l'a expliqué de manière détaillée dans ses pièces écrites, le transport de passagers en tant qu'activité commerciale fut soigneusement exclu du droit de navigation reconnu par l'article VI du traité[25].

30. Finalement, le Nicaragua n'a pas gardé un silence «assourdissant» que lui veut attribuer le Costa Rica[26] au sujet de la clause relative à la prétention du Gouvernement et des citoyens costa-riciens de bénéficier d'un libre passage pour le fleuve San Juan d'un océan à l'autre, renfermée dans les traités conclus par le Nicaragua avec les Etats-Unis, la France et la Grande-Bretagne entre 1857 et 1860. Dans la duplique du Nicaragua on peut trouver la réponse adéquate[27]. En fin de compte cette clause se limitait à préserver les prétentions des citoyens et du Gouvernement costa-riciens à un libre passage dans la perspective de la construction éventuelle d'un canal interocéanique traversant partiellement le fleuve San Juan.

Monsieur le président, Messieurs les juges je vous remercie de votre très aimable attention et ayant conclu mon exposé, je vous prie, Monsieur le président, d'appeler le professeur Pellet à cette barre pour la suite des plaidoiries du Nicaragua.

The PRESIDENT: Thank you, Professor Remiro Brotóns, for your presentation. I now give the floor to Professor Alain Pellet.

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[25] Contre-mémoire du Nicaragua (CMN), p. 161-165, par. 4.1.37-4.1.48 ; DN, p. 151-154, par. 3.90-3.95.

[26] CR 2009/6, p. 31, par. 42.

[27] DN, p. 153-154, par. 3.94.

M. PELLET :

III. INTERPRÉTATION DU TRAITÉ (SUITE)

1. Monsieur le président, Messieurs les juges, il m'incombe ce matin de me pencher à nouveau sur l'interprétation de l'expression «avec des marchandises» («con objetos de comercio») en répondant aux arguments avancés par les professeurs Crawford et Kohen sur ce point, que le professeur Remiro Brotóns n'a encore pas réfutés. Sans m'astreindre à un plan «à la française», je le ferai en suivant en substance l'ordre dans lequel nos contradicteurs ont formulé leurs critiques.

1. Le paradoxe du professeur Crawford : «moins = plus»

2. Monsieur le président, je pars pour l'instant du principe que le droit (perpétuel) de navigation du Costa Rica sur le fleuve — pas forcément sur l'éventuel futur canal… — soit acquis à la condition que cette navigation se fasse avec des marchandises comme «objetos de comercio». Voyons si, indépendamment de l'analyse lexicale et grammaticale à laquelle Antonio Remiro a procédé, ceci est aussi absurde que le dit le professeur Crawford[28] dont les conceptions mathématiques laissent perplexe puisque pour lui «moins = plus», «cependant = de plus», «pero = más aún».

[illegible]. Permettez-moi de remarquer d'abord, Messieurs les juges, que je ne comprends plus du tout pourquoi la Partie costa-ricienne s'obstine à défendre une interprétation différente de la nôtre puisque James Crawford a expliqué que «même si» *(even if)*, l'expression contestée signifie ««articles de commerce» ou «articles of trade», these are words of extension, not limitation»[29]. Then, pourquoi, alors, s'opposer à une définition si avantageuse qui, loin de limiter les droits du Costa Rica, les étendrait ? Il est rare que toute une équipe de conseils joue ainsi contre son camp..

4. Il faut dire que le raisonnement de notre contradicteur est pour le moins alambiqué. Si je l'ai bien compris, il nous dit :

1) le Nicaragua a reconnu au Costa Rica un droit de libre navigation ;

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[28] Cf. CR 2009/6, p. 16-18, par. 32-38.

[29] *Ibid.*, p. 17, par. 33.

2) par hypothèse, la liberté de navigation suppose l'exonération de taxes, d'impôts et de droits de douane ; et,

3) si l'on précise ensuite que ceci s'applique aux marchandises, cette précision «is not there as a limitation of the right of free navigation ; it makes it clear that the freedom extends to trade goods you may be carrying with you. The words are, quite simply, not words of limitation at all.»[30]

5. Mais, Monsieur le président, si, par définition, la libre navigation implique l'exonération des droits de douane, comme ceux-ci ne peuvent être appliqués qu'à des marchandises ou à des services, il est clair qu'en précisant que la liberté en question s'applique à la navigation «avec des marchandises» comme «objetos de commercio», les rédacteurs du traité entendait bien signifier qu'elle ne s'appliquait qu'à une telle navigation. Cette formule, à l'évidence, n'étend rien — elle restreint. «Moins = moins».

2. La parabole de la poule et des œufs

6. Mais… il y a la parabole de la poule de M. Crawford[31]. Si je peux lui donner un conseil : le plus avisé serait qu'il se rende au marché de Sarapiquí non seulement avec ses œufs, mais aussi avec sa poule — qui, elle aussi est un objet de commerce — et qu'il revienne avec elle. Cela lui éviterait les désagréments qu'il redoute et lui ferait de la compagnie.

7. Plus sérieusement, je pense qu'il devrait garder à l'esprit que toute interprétation doit être faite de bonne foi, être raisonnable, et donner aux dispositions conventionnelles un sens utile. Ainsi que la Cour l'a rappelé dans son avis consultatif de 1950 : «[L]e premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de *s'efforcer de donner effet*, selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte» (*Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950*, p. 4 ; les italiques sont de nous). Pour que la liberté de navigation reconnue au Costa Rica par l'article VI du traité Cañas-Jerez ait un effet utile, il faut l'interpréter

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[30] *Ibid.*, par. 34 (Crawford).

[31] *Ibid.*, par. 35.

— raisonnablement — comme permettant au professeur éleveur de poules de revenir de Sarapiquí sans ses œufs.

8. Au surplus, prise au pied de la lettre, la fabulette de la poule ne permet pas davantage de donner un effet utile à l'interprétation du Costa Rica lui-même qu'à celle du Nicaragua : si le professeur Crawford va à Sarapiquí avec l'intention d'y faire du commerce (à des fins commerciales) mais s'en revient avec celle de se divertir ou d'admirer le paysage, sans aucune «intention commerciale», il ne peut pas davantage se prévaloir de la liberté de navigation reconnue par l'article VI du traité Jerez-Cañas. Et la même chose vaut pour l'argument qu'il veut tirer de son expérience personnelle lorsqu'il se plaint qu'on ne l'a pas assez contrôlé[32].

3. Un défi sans pertinence

9. J'en viens, Monsieur le président, au «défi» que nous a lancé le professeur Crawford. Il me semble que, quand bien même il n'y aurait aucun exemple de traité rédigé conformément à la réécriture de l'article VI du traité de 1858 opérée par mon contradicteur (qui voudrait y lire «si, et seulement si, il s'agit d'une navigation avec des marchandises» — «if and only if this navigation is with articles of trade»[33]), cela ne signifierait pas que le traité Cañas-Jerez serait dépourvu de sens, ou que l'interprétation que nous en faisons serait absurde («an obvious nonsense»[34]). Notre instrument, comme la Partie costa-ricienne l'a fort justement souligné[35], est très particulier : traité de frontières, il fixe une limite à la rive (ce qui, en soi, est inhabituel), tout en octroyant des droits (de navigation perpétuelle avec des marchandises) à l'Etat n'ayant pas la souveraineté sur le fleuve. Les chances statistiques de retrouver exactement la même clause dans un autre traité sont donc très faibles.

10. Chaque instrument est unique et ce sont «ses termes»[36] qui sont l'objet de l'interprétation, pas un «concept» abstrait ou une formule hypothétique. Les termes «avec des

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[32] CR 2009/6, p. 18, par. 37 (Crawford).

[33] *Ibid.*, par. 36.

[34] *Ibid.*

[35] CR 2009/2, p. 32, par. 7 ; p. 34, par. 12 (Caflisch) ; CR 2009/3, p. 22, par. 2 (Caflisch) ; CR 2009/6, p. 38-39, par. 7 et 8 ; p. 40, par. 13 i) (Caflisch) ; p. 66, par. 8 (Ugalde-Alvarez).

[36] Voir *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21-22, par. 41 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1060, par. 20.

marchandises» («con objetos de comercio») doivent avoir un effet utile[37] — que lui donne l'interprétation qu'en propose le Nicaragua, mais dont le prive celle du Costa Rica : car pour aller dans le sens costa-ricien, il aurait été suffisant d'accorder un «droit perpétuel de libre navigation» (tout court) pour assurer à la Partie demanderesse un droit aussi absolu et aussi illimité qu'elle le réclame.

4. Navigation sur le San Juan

11. Monsieur le président, je ne peux malheureusement pas contre-interroger le témoin Crawford mais si, comme je le suppose, il a emprunté l'un de ces petits bateaux qui transportent les touristes sur le San Juan [projection n° 1], un coup d'œil suffisait aux militaires chargés de procéder à l'inspection pour s'assurer qu'il ne s'agissait pas de commerce de marchandises ; bien sûr, il eût pu s'agir de marchandises illicites, adroitement cachées dans les bagages ou dans les chaussettes du professeur Crawford — mais a-t-il l'allure d'un dangereux contrebandier ou d'un trafiquant de drogue ? Ceci dit, on ne peut raisonnablement prétendre, je l'ai dit, que la liberté de navigation dont dispose le Costa Rica soit illimitée ou «absolue». [Fin de la projection n° 1.] Je signale d'ailleurs au passage, Monsieur le président, que si cet adjectif («absolu») n'apparaît peut-être que quatre fois dans les écritures du Costa Rica et sans que l'on puisse imputer à celui-ci une interprétation excessive et déraisonnable[38], en revanche, le professeur Caflisch qui, j'en suis sûr, est l'interprète fidèle de la position de la Partie costa-ricienne l'a, pour sa part, utilisé pas moins de quatre fois[39] lors de sa seule présentation de mardi de la semaine dernière, pour caractériser le droit de navigation reconnu dans le traité de 1858.

12. Revenons au voyage — sans œufs cette fois — du professeur Crawford. Il semble se plaindre que les douaniers ou la police des frontières du Nicaragua ne l'aient pas *interrogé* sur les marchandises qu'il transportait — ou non : «But it made no difference whether I had articles of trade or not. No one asked if I was carrying articles of trade»[40]. Mais ceci relève de la logique la plus élémentaire, Monsieur le président : le principe, sur le fleuve, c'est la souveraineté du

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[37] Voir, par exemple, *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 24.

[38] CR 2009/6, p. 8, par. 2 (Crawford).

[39] CR 2009/3, p. 23, par. 7, p. 30, par. 23, p. 31, par. 26, p. 33, par. 33.

[40] *Ibid.*

Nicaragua ; si M. Crawford entendait se prévaloir de la liberté de navigation garantie à son client par le traité de 1858, c'était à lui de préciser qu'il se trouvait dans le cadre de l'exception ; il ne le pouvait pas ; il le dit lui-même : «Je suis allé là-bas sans article de commerce» («I went there without any articles of trade») — et comme, à juste titre d'ailleurs, touriste qu'il était, il ne se considérait pas lui-même comme une marchandise, comme un *objeto de comercio*, il ne pouvait pas se prévaloir de l'exception et il ne s'en est pas prévalu.

5. Retour à la sentence Cleveland

13. Monsieur le président, j'en viens maintenant aux reproches tous azimuts que nous adresse le professeur Marcelo Kohen, auxquels Antonio Remiro Brotóns a déjà répondu pour partie. Remontons d'abord aux années 1886-1888, c'est-à-dire l'argumentation des Parties devant Cleveland et la sentence de celui-ci.

Les argumentations des Parties

14. S'agissant de «l'approche du Costa Rica» mon ami et contradicteur persiste et signe. Mais, c'est pour mieux esquiver le problème. [Projection n° 2.] Il a projeté à l'écran la réponse du Costa Rica à ce qu'il appelle la «question rhétorique» sur laquelle nous avions insisté durant le premier tour[41] et que, cette fois, je projette à mon tour :

> «Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly *within the meaning of transportation of merchandise*?»[42]

15. La question donc — rhétorique ou pas — que se posait le Costa Rica (avec une pointe d'indignation sous-jacente) revenait à faire valoir que, si Cleveland ne lui reconnaissait pas le droit de naviguer avec des vaisseaux publics, il serait réduit au seul transport des marchandises *(transportation of merchandise)*. [Fin de la projection n° 2 ; projection n° 3.] Evidemment *sa propre réponse* était qu'il ne devait pas en aller ainsi et qu'il était

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[41] CR 2009/4, p. 58-59, par. 20-21 (Pellet) ; CR 2009/5, p. 31-32, par. 13 (McCaffrey).

[42] DN, vol. II, annexe 5, Argument on the Question of the Validity of the Treaty of Limits Between Costa Rica and Nicaragua and Other Supplementary Points Connected with it, submitted to the President of the United States of America, Filed on Behalf of the Government of Costa Rica ; les italiques sont de nous.

> «indiscutable que le Costa Rica peut naviguer sur le San Juan avec des bateaux publics qui ne sont pas des vrais navires de guerre… Le sens de l'expression «navigation commerciale» inclut nécessairement la police douanière, l'acheminement du courrier ainsi que tout autre service public de même nature»[43].

16. Seulement voilà, Cleveland, lui, a donné une réponse différente : au lieu de reconnaître la liberté de navigation pour tous les navires publics costa-riciens autre que les «vrais navires de guerre», il limite celle-ci aux seuls navires du service des douanes, et je cite la sentence Cleveland, «dans la mesure où cette navigation est en relation avec, et liée au» *(as may be related to and connected with ...)* [le] droit qui lui est reconnu à l'article VI du traité. [Reprise de la projection n° 2.] Dès lors, comme le Costa Rica le redoutait, les bateaux des douanes mis à part, il en est réduit, de son propre aveu, au seul transport des marchandises («exactly within the meaning of transportation of merchandise»).

17. De son côté, selon le professeur Marcelo Kohen, le Nicaragua, s'il avait eu des doutes sur le bien-fondé de la traduction de l'expression «con objetos de comercio» par «for the purposes of commerce» aurait dû rajouter l'expression espagnole entre parenthèses après sa traduction, comme il l'avait fait pour d'autres mots. Mais tous ces termes (trois mots isolés et deux expressions) ont comme caractéristique commune de concerner des problèmes qui, eux, *étaient en cause* devant l'arbitre, ce qui n'était pas le cas de l'expression «avec des marchandises»[44].

18. Quoi que semble en penser M. Kohen, cette absence de désaccord est aussi ce qui interdit de voir dans la traduction des deux Parties de l'expression «objetos de comercio» par «purposes of commerce» un quelconque accord concernant l'interprétation de cette expression. Certes, le conseil du Costa Rica a tout à fait raison de souligner que les Etats peuvent se mettre d'accord sans désaccord préalable[45]. En revanche, un accord ne saurait être inadvertant ; il ne peut résulter que de la rencontre de deux *volontés :* en l'espèce, le Costa Rica et le Nicaragua ont traduit l'expression *aujourd'hui* litigieuse de la même manière mais il s'agit là d'un fait, pas de la rencontre délibérée de deux volontés — ou d'une formule proposée par l'un des Etats à laquelle l'autre aurait consenti.

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[43] MCR, vol. 6, annexe 207, p. 155 *[traduction du Greffe]*. Texte anglais original : «The answer seems to be very simple . . . It seems to be beyond discussion that Costa Rica can navigate in the San Juan river with public vessels, which are not properly men-of-war. Within the meaning of the words, commercial navigation, both the revenue police, the carrying of the mails, and all other public services of the same kind are necessarily included» (*ibid.*, p. 155-156). Dossier de plaidoiries, onglet n° AP-3.

[44] Voir CR 2009/2, p. 60, par. 47 (Kohen) ; CR 2009/4, 5 mars 2009, p. 57, par. 19 (Pellet) ; CR 2009/6, p. 29, par. 31 (Kohen).

[45] CR 2009/6, p. 29, par. 31.

Et j'ajoute que c'est là un fait dont le contexte montre qu'il n'a nullement la signification dont le Costa Rica veut le revêtir — il suffit de penser à l'interprétation de la Partie costa-ricienne elle-même dans l'argumentation écrite qu'elle avait proposée au président Cleveland, et dont je viens de redire quelques mots. [Fin de la projection n° 2*bis*.]

La sentence

19. Reste, Monsieur le président, la sentence elle-même. A cet égard, le professeur Kohen a beau me taxer «d'imagination débordante»[46] ou «étendue»[47], «d'affirmations des plus légères»[48], de «fébrilité»[49] — et j'en passe (ça fait beaucoup de noms d'oiseaux dans une seule page du compte rendu...) ; [projection 4] le fait est que le libellé du «Deuxièmement» est vraiment troublant, *très* troublant :

> «The Republic of Costa Rica under said Treaty [the 1858 Treaty] and the stipulations contained in the sixth article thereof, . . . may navigate [the river San Juan] with such vessels of the Revenue Service *as may be related to and connected with her enjoyment of the 'purposes of commerce'* accorded to her in said article . . .»

20. D'abord, il y a les guillemets. Répétant ce qui est dit dans la réplique[50], Marcelo Kohen nous dit qu'ils «s'expliquent tout simplement par le fait que Cleveland était en train de citer les termes de l'article VI tels que traduits par les deux Parties»[51]. Comme je l'avais indiqué la semaine dernière, ce n'est guère convaincant. Monsieur le président, la sentence n'utilise les guillemets qu'en une seule autre occasion, pour attirer, justement, l'attention sur un problème d'interprétation[52]. Par ailleurs et à l'inverse, Cleveland procède, évidemment, à la citation de très nombreux mots ou expressions figurant dans le traité et traduits de façon identique par les Parties sans, pour autant, éprouver le besoin de les mettre entre guillemets : c'est le cas par exemple des «natural rights» («droits naturels») qu'il évoque au point 10 de la troisième partie de sa sentence sans les assortir de guillemets bien qu'il s'agisse d'une citation de l'article VIII du traité, dont la

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[46] *Ibid.*, p. 27, par. 24.

[47] *Ibid.*, par. 26.

[48] *Ibid.*, par. 24.

[49] *Ibid.*, par. 25.

[50] RCR, p. 65, par. 3.68.

[51] CR 2009/6, p. 27-28, par. 26.

[52] Voir CR 2009/4, p. 58, par. 19.

traduction n'allait tout de même pas de soi ; de même, l'arbitre n'a pas considéré nécessaire de mettre entre guillemets, dans le point 1 de la sentence, l'expression «the extremity of Punta Castilla of the mouth of the San Juan de Nicaragua River» dans le point 10 bien qu'il s'agisse de citations pures et simples de l'article II du traité.

21. [Projection 4-1.] Mais il y a plus important encore. Relisons ensemble, Messieurs les juges, si vous le voulez bien, le membre de phrase dans lequel figure l'expression entre guillemets : «may navigate [the river San Juan] with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce'». Mais comment peut-on jouir de «fins commerciales» (how can you *enjoy «purposes of commerce»* ?). Pris à la lettre cela n'a aucun sens — ni en français (Marcelo Kohen l'avait bien vu même si, maintenant il s'en défend[53]), ni en anglais. [Projection 4-2.] Et l'on comprend l'embarras des traducteurs du Greffe qui proposent une traduction très libre en français, s'éloignant considérablement du texte anglais : «mais elle peut naviguer sur ledit fleuve avec des bateaux du service des douanes dans l'exercice du droit d'usage de ce fleuve «aux fins du commerce» que lui reconnaît ledit article»[54]. Alors là, oui, cela fait sens — mais cela fait sens aussi si l'on remplace «aux fins du commerce» par «avec des marchandises» ; et cela peut aussi se lire en anglais «may navigate with such vessels of the Revenue Service as may be related to and connected with her enjoyment of *her right of navigation* on the river for 'purposes of commerce' or, as well, «with articles of commerce». Et cela confirme aussi, Monsieur le président, que Cleveland, ayant sans doute vu le problème, s'est prudemment abstenu de le trancher en recourant à ces guillemets troublants — mais ils n'ont pas l'air de beaucoup troubler mon collègue et ami de l'autre côté de la barre… [Fin de la projection 4-2.].

6. Bref retour sur l'interprétation évolutive

22. Monsieur le président, n'étant pas particulièrement élitiste, je me réjouis vivement de l'avènement d'un tourisme de masse, permettant au plus grand nombre de profiter des beautés de notre bonne vieille planète. Mais je ne vois pas bien ce que ces considérations de philosophie sociale viennent faire ici ? Que le tourisme existât au temps de Mark Twain, aucun doute (même si

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[53] Voir CR 2009/6, p. 27, par. 24.

[54] MCR, vol. 2, annexe 16, p. 34 *[traduction du Greffe]*.

je n'ai pas l'impression qu'il ait effectué son voyage de 1863 entre San Francisco et New York en qualité de touriste[55] — mais plutôt comme passager ce qui, comme mon ami Antonio Remiro l'a expliqué, est quelque chose de différent). Mais ce qui importe pour nous, c'est que le mot «tourisme» n'avait alors aucune connotation commerciale et qu'il n'est tout simplement pas pensable que les rédacteurs du traité Cañas-Jerez aient eu le tourisme à l'esprit lorsqu'ils ont rédigé l'article VI.

23. Cela me conduit à redire quelques mots de l'interprétation évolutive[56] — sans qu'il me semble utile de m'y attarder. Au fond, le professeur Kohen s'est borné lundi à répéter le peu qu'il avait dit à ce propos durant le premier tour[57] : il faut s'en tenir au précédent du *Plateau continental de la mer Egée*[58]. Mais il ne suffit par de dire que le mot «commerce» est «générique» pour être débarrassé du problème. Il faut encore se demander comment il était interprété à l'époque (pour déterminer quelle était l'intention des Parties) et si cette signification n'a pas subi une évolution telle que l'on s'éloigne par trop de celle que les négociateurs avaient en tête au moment de la conclusion du traité[59]. Or, je l'ai montré la semaine dernière, ce serait le cas, si l'on en venait à inclure dans les «marchandises» ou même dans les «fins commerciales», le tourisme — une activité qui existait au XIX^e^ siècle, mais que nul n'aurait songé à qualifier de «commerciale».

7. L'absence de pratique subséquente

24. Reste à savoir, Monsieur le président, si la pratique subséquente devrait (ou pourrait) conduire à adopter une position différente, voire même s'il existerait une coutume internationale qui obligerait l'Etat fluvial à autoriser la navigation des touristes sur ses fleuves et rivières. Cette seconde «piste», à vrai dire, me paraît assez extravagante — je ne la mentionne que parce que mon fougueux contradicteur s'obstine à interpréter ainsi l'arrêt de la Cour dans l'affaire de l'*Ile de Kasikili/Sedudu*[60]. Je l'avais montré[61], dans cette affaire, c'est en vertu de l'accord exprès des deux

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[55] Voir http://www.accessmylibrary.com/coms2/summary_0286-32179301_ITM.

[56] Voir CR 2009/4, p. 49-55, par. 3-12.

[57] CR 2009/2, p. 67, par. 73 et note 192.

[58] CR 2009/6, p. 35, par. 58.

[59] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950*, p. 229 et *Droits des ressortissants des Etats-Unis d'Amérique au Maroc (France c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1952*, p. 196.

[60] CR 2009/6, p. 33, par. 48.

Etats concernés, que la pratique antérieure a été juridiquement consacrée et entérinée par la Cour[62]. Or, à l'évidence, pas d'accord en ce qui nous concerne.

25. Mais pas non plus de pratique, Monsieur le président ! Les trois très brefs paragraphes qu'y consacre mon contradicteur[63] ne répondent pas à l'argumentation que j'avais fait valoir à cet égard durant le premier tour[64], et ne vont guère au-delà d'affirmations que le professeur Kohen ne prend la peine ni d'expliciter, ni de discuter. Il me suffira donc de dire :

1) que s'il y a eu, en effet, dans un lointain passé, un trafic relativement intense de passagers — Antonio Remiro en a parlé —, celui-ci était exclusivement le fait *du Nicaragua*, pas du Costa Rica ;

2) en tout état de cause, il n'a jamais été question de tourisme organisé sur le San Juan avant une période fort récente ;

3) si, au tout début du phénomène, une certaine tolérance a pu se manifester, une simple tolérance ne crée pas de droit (comme le Costa Rica le répète à l'envi — en matière de pêche de subsistance par exemple[65], ou de dispense de l'exigence d'un visa pour les Costa-Riciens riverains du fleuve[66] notamment) ; en revanche,

4) dès que le phénomène a pris de l'ampleur (en même temps que les prétentions du Costa Rica à une interprétation de plus en plus extensive et absolue de ses prétendus droits sur le fleuve), le Nicaragua s'y est vigoureusement opposé.

26. Pas de pratique subséquente, pas d'accord ultérieur, Monsieur le président. L'article VI du traité de 1858 doit être lu tel qu'en lui-même, en fonction des intentions des négociateurs de cet instrument. Et cette intention, telle qu'elle ressort du texte de cette disposition, de son contexte et des circonstances de cette adoption est claire : le Costa Rica peut se prévaloir d'un droit, perpétuel (mais non absolu), de libre navigation sur le fleuve, avec des marchandises mais, certainement pas, pour les touristes ou avec des touristes. De même, si les bateaux des douanes peuvent naviguer

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[61] CR 2009/4, p. 55, par. 12.

[62] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1107, par. 102.

[63] CR 2009/6, p. 33-34, par. 51-53.

[64] CR 2009/4, p. 55-64, par. 13-32.

[65] CR 2009/6, p. 63, par. 30 (Crawford).

[66] CR 2009/3, p. 27-28, par. 19 (Caflisch) ; CR 2009/6, p. 17, par. 35 (Crawford).

librement sur le fleuve, conformément à la décision du président Cleveland, ceci ne leur est possible que dans le strict exercice de ce droit d'usage du fleuve, ce que mon collègue et ami le professeur McCaffrey va établir maintenant si vous voulez bien lui donner la parole, Monsieur le président ?

27. Pour ma part, il ne me reste qu'à vous remercier de la bienveillante attention que vous m'avez à nouveau prêtée.

The PRESIDENT: Thank you, Professor Alain Pellet, for your presentation. I now give the floor to Professor Stephen McCaffrey.

Mr. McCAFFREY: Thank you, Mr. President.

IV. COSTA RICA'S NAVIGATION ON THE SAN JUAN RIVER WITH PUBLIC VESSELS: THE TREATY OF LIMITS AND THE CLEVELAND AWARD

1. Mr. President, Members of the Court, it is an honour to appear before you again today on behalf of the Republic of Nicaragua.

1. Introduction

2. This morning I will show how Costa Rica misunderstands and mischaracterizes the provisions of the 1858 Treaty of Limits and the 1888 Cleveland Award concerning navigation on the San Juan River by public vessels. Costa Rica persists in reading Article VI of the Treaty as if it contained only nine words: "Costa Rica shall have perpetual rights of free navigation." Actually, that is not true — she adds to this phrase six more words, which are purely of her own invention. Those words are: "with all kinds of public vessels". She pays lip service — but only barely — to Nicaragua's sovereignty over the river, but then through a multi-pronged attack, seeks to fragment Nicaragua's sovereignty into so many effete and helpless bits that Nicaragua is prevented from fulfilling her responsibility to police and regulate the river, let alone exercising her rights in the waterway — which, after all, is part of her territory. For all of Costa Rica's objections to them, Nicaragua's regulations concerning navigation by Costa Rica on the San Juan — again, Nicaraguan territory — are in line with those on *true* international waterways, such as the Rhine, which is

governed by what Paul Reuter called the "doyen of international organizations", the Central Commission for Navigation on the Rhine[67].

3. Mr. President, my specific task this morning is to address two points: first, the 1858 Treaty as interpreted by the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels on the San Juan; and second, Article IV of the 1858 Treaty also provides no basis for the navigational rights Costa Rica claims for her public vessels.

2. The 1858 Treaty as interpreted by the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels on the San Juan

4. Mr. President, Members of the Court, as to the first point, in her quest for rights of navigation by public vessels on the San Juan, Costa Rica places greatest store in the Cleveland Award. Here she focuses principally on three arguments: first, that the Cleveland Award did not determine Costa Rica's rights to navigate with any and all public vessels; second, that President Cleveland actually *enlarged*, not restricted, George Rives's recommendations concerning navigation by Costa Rican public vessels; and third, that Costa Rica's failure to exercise her limited right to navigate on the San Juan with revenue vessels does not destroy that right. I will take these arguments up in turn.

5. First, Mr. President, Professor Crawford argued again on Monday that in his Award, President Cleveland did not determine Costa Rica's rights to navigate with any and all public vessels[68]. He persisted in this argument despite the fundamental illogic of it: Nicaragua has sovereignty — sovereignty — over the river, which forms part of her territory; Costa Rica has only rights to navigate "con objetos de comercio" under the Treaty. The Treaty having granted no other rights to Costa Rica in Nicaraguan sovereign territory, how could there possibly be *further* rights — further rights — that President Cleveland did not explicitly recognize? You cannot recognize what is not there. Finding that there could be further navigational rights would make a mockery of the 1858 Treaty. This is doubtless the major reason why President Cleveland was so careful to keep the *only* kind of public vessels he allowed to navigate on the San Juan, revenue

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[67] See generally http://www.ccr-zkr.org/.

[68] CR 2009/6, p. 51, para. 4 *et seq.*

vessels, on such a short leash. In light of Nicaragua's "sumo imperio" over the river, interpreting Article VI of the Treaty and the *Second* Article of the Cleveland Award to permit navigation by the veritable armada of kinds of public vessels argued for by Costa Rica would, to borrow from the language of Article 31 of the 1969 Vienna Convention, lead to a result which would be manifestly absurd and unreasonable. Such an interpretation should therefore be rejected by the Court.

6. Second, Mr. President, Professor Crawford went to great lengths on Monday to attempt to shrink down to something akin to mere courtesies the "privileges" of navigation on the San Juan by Costa Rican warships and revenue vessels recommended by George Rives. He did this in a Herculean, but ultimately futile, effort to convince the Court of the following improbable proposition: that President Cleveland, by allowing only carefully restricted navigation by Costa Rican revenue vessels, somehow gave Costa Rica much *more* than Rives, who would have allowed *both* Costa Rican revenue vessels *and warships* to navigate on the San Juan, and with only those restrictions that were generally recognized internationally. It would take a magician to pull this off, and Professor Crawford is a very good one. He attempted this analytical sleight of hand by contrasting the "privileges" recommended by Rives with the "rights" recognized by President Cleveland.

7. But however they are characterized, the authorizations recommended by Rives and those granted by President Cleveland could not be more different. When all is said and done, the arbitrator took a recommendation that navigation by warships and revenue vessels would be allowed and whittled it down to what he evidently considered to be the barest of essentials: navigation with revenue vessels that was related to and connected with navigation "con objetos de comercio", or that was necessary to the protection of the enjoyment thereof. Especially given Nicaragua's sovereignty over the river, there is nothing left from which to conjure supposed additional rights of navigation by public vessels.

8. Incidentally, as my colleague Professor Pellet has just noted, Professor Crawford also challenges the use by me and other counsel of Nicaragua of the expression in Spanish "con objetos de comercio", in lieu of the English translation of this expression submitted to President Cleveland by both Nicaragua and Costa Rica "for purposes of commerce". But, Mr. President, as Professor Pellet has just pointed out, the Treaty itself was negotiated and concluded in Spanish, not

English. Nicaragua has amply demonstrated in her written pleadings[69] that the meaning of this expression was not at issue in the arbitration; there was simply no dispute about it by the Parties at the time. President Cleveland took great pains to make clear that his ruling was without prejudice to the meaning of the expression by enclosing it in quotation marks in the *Second* Article of his Award.

9. Mr. President, Members of the Court, I turn now to Costa Rica's third point. Professor Crawford states that "whether Costa Rica exercises its treaty right to navigate with revenue service vessels is irrelevant", because "the right survives independently of its exercise"[70]. But here Professor Crawford misses the point: Costa Rica has not exercised her right to navigate with revenue vessels because she has not exercised her right to navigate "con objetos de comercio". She therefore has engaged in a campaign, for over a century, to transform her right to navigate with revenue vessels *into* a right to navigate with public vessels of *all* kinds and descriptions, both armed and unarmed. It is *this* that is not permitted by the Treaty of Limits and the Cleveland Award, and that is therefore not permitted by Nicaragua on her sovereign territory — *not* navigation by revenue vessels related to and connected with navigation "con objetos de comercio" or necessary to the protection thereof, with which Nicaragua has never interfered. As Costa Rica herself has amply shown[71], President Cleveland knew well what a revenue vessel was, and therefore knew that this expression, "vessels of the revenue service" as he put it, had a very specific meaning. A revenue vessel is not a police boat. A revenue vessel is not a boat carrying arms and personnel to resupply border posts. In short, a revenue vessel is not a public boat performing the myriad functions Costa Rica would like to perform with her public vessels on the river. Wishing does not make it so. Therefore, although Costa Rica's failure to exercise her limited right to navigate on the San Juan with revenue vessels does not destroy the right, it most certainly does not extend it or enlarge it.

10. Mr. President, finally on this point, on Monday Costa Rica continued to beat the dead horse of the Cuadra-Lizano Joint Communiqué — or perhaps that is an inappropriate metaphor

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[69] CMN, paras. 3.1.19 *et seq.*

[70] *Ibid.*, para. 14.

[71] E.g., CR 2009/3, p. 13, para. 23.

muniqué was never alive in the first place. Here Professor Crawford tries mightily to
Court that this document had nothing to do with Nicaragua giving permission to
navigate with arms on the San Juan. He then tries much less mightily to show, in fact
, that the communiqué reflected the *status quo ante*.

President, Members of the Court, the Cuadra-Lizano Joint Communiqué would have
blanket authorization for use of Costa Rican public vessels under specified conditions
gle and very specific purpose: the resupplying of her border posts. Nothing more.
the river, not the provision of services to the riparian population — nothing but the
f border posts. After 120 years, this is the extent of navigation by Costa Rican public
Nicaragua was willing to consider — and in fact it was considered in the context of a
e moment: resupplying border posts. Costa Rica has not resupplied these posts via
n the past ten years.

, Mr. President, the important point here is that Costa Rica would not have been so
his stillborn communiqué — she would not have *needed* this authorization — if she
and believed she had, a right to navigate with vessels carrying arms and personnel to
osts. As to whether the communiqué reflected past practice, if it had, why would
ve sought the authorization so fervently? In any event, the fact that the communiqué
ct past practice has already been shown by my colleague Mr. Reichler.

cle IV of the 1858 Treaty also provides no basis for the navigational rights Costa Rica claims for her public vessels

. President, Members of the Court, turning to my second point, Costa Rica in her
effectively conceded that Article IV of the Treaty of Limits provides no basis for her
otherwise police the *river* by boat. The best she could do by way of responding to the
ct that Article IV says *nothing* about Costa Rica's uniting in the defence of either the
iver by *boat* was to caricature the manner in which she would have to fulfil this
"synchronized swimming"[72] — a nice image, to be sure, but unfortunately there
thing for her to synchronize with since Nicaragua would prefer to exercise *her*

. 54, para. 11.

obligations of defence of the river by boat, as she alone is entitled to do. Costa Rica also conflates Article IV's provision for "defense" of the common bays and the river "in case of attack from without"[73] with "protect[ion] of commerce on the river", implying that both of these are authorized by Article IV[74]. As the Court is well aware, Article IV says nothing — indeed the entire 1858 Treaty says nothing — about protection of commerce on the river by Costa Rica. That idea was a creature of the Cleveland Award, which I addressed earlier, and as we have seen President Cleveland was very careful to restrict any protection to *revenue* vessels, not other kinds, and only when *necessary* to the protection of navigation "con objetos de comercio"[75]. Perhaps Costa Rica was led to confuse defence with protection by her earlier idea — from which she now seems to have backed away — that the San Juan is an "international river". For the purpose of Costa Rica's navigational rights it certainly is not, for reasons that Nicaragua has shown[76], and as Costa Rica now seems to accept.

14. Mr. President, Members of the Court, I will close on the subject of Costa Rica's contention concerning policing and defending the river by boat with the wise words of a former President of Costa Rica herself. In his memoir, *Su pensamiento*, President Don Ricardo Jiménez Oreamuno, who served as President during three periods between 1910 and 1936, wrote the following of what he called "the obligation assumed by Costa Rica to take part in the river's defense in the event of foreign aggression":

> "Costa Rica shall take part in this defense when the foreseen hypothesis [foreign aggression] takes place.
>
> Meanwhile, in full peace, without the slightest risk of hostilities, to pretend that our ships of war navigate the river in order to take part in a defense provoked by no attack is to arrive at the subtlety with which the Nicaraguans have examined the treaty. Through Article 4, Costa Rica was obliged to defend the San Juan as an ally of Nicaragua. When has one seen that an ally, being an ally, purports to have the right, in the absence of war, to transit with its troops the allied territory to navigate with warships her interior waters or station armadas in her ports?"[77]

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[73] Article IV of the 1858 Treaty.

[74] CR 2009/6, p. 54, para. 11 (Crawford).

[75] Cleveland Award, *Second* Article.

[76] E.g., CR 2009/04, pp. 19, *et seq.* (Brownlie).

[77] Don Ricardo Jiménez Oreamuno, *Su pensamiento*, Editorial Costa Rica, San José, Costa Rica, 1980, p. 55. For the full quotation see CMN, pp. 222-223, in which the former President also refers to navigation by Costa Rican "merchant ships" under Article VI of the Treaty.

15. Mr. President, the eloquent words of the former Costa Rican President speak for themselves, and confirm the only sensible interpretation of the 1858 Treaty.

16. Mr. President, Members of the Court, that concludes my presentation. I thank you for your courtesy and kind attention. Mr. President, I request that you call upon my colleague, Mr. Paul Reichler, perhaps after the coffee break. Thank you very much.

The PRESIDENT: Thank you, Professor McCaffrey, for your presentation. Yes, indeed, as you suggest, I am going to call for a short coffee break before I ask Mr. Paul Reichler to take the floor.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I now give the floor to Mr. Paul Reichler.

Mr. REICHLER:

V. THE LAWFULNESS OF NICARAGUA'S REGULATIONS AND THE PRACTICE OF THE PARTIES WITH RESPECT TO NAVIGATION BY PUBLIC VESSELS

1. Mr. President, Members of the Court, I am honoured once again to appear before you today. I will respond first to Professor Caflisch's presentation regarding the lawfulness of Nicaragua's regulation of navigation on the San Juan River, and then I will respond to Professor Crawford's presentation on the practice of the Parties with regard to navigation by Costa Rican public vessels.

1. The lawfulness of Nicaragua's regulations

2. Mr. President, after listening to Professor Caflisch on Monday, I can begin today with the good news that Nicaragua's right to regulate navigation on the San Juan River is no longer disputed by Costa Rica. It is now possible, for the first time, to say that both Parties agree that Nicaragua has the right to regulate navigation on the river, including navigation by Costa Rica, provided that Nicaragua's regulation of that navigation is reasonable, non-arbitrary and non-discriminatory. As Professor Caflisch said on Monday: "[W]hen mentioning regulations, [the authorities] specify that

they must be reasonable, non-arbitrary, non-discriminatory. This has been, and also is, the position of Costa Rica: riparian States may regulate if they respect these conditions."[78]

3. With the Parties now in agreement that Nicaragua has the right to regulate Costa Rican navigation on the San Juan River, provided that the regulations put in place by Nicaragua are reasonable, the burden for the Court has been reduced: the Court need only decide whether Nicaragua's regulations are proven by Costa Rica to be unreasonable.

4. On this subject, I am afraid, the Parties are still divided. While Professor Caflisch now accepts that Nicaragua has the right to regulate navigation, he sticks firmly to his guns on the issue of the reasonableness of Nicaragua's regulations. In fact, he made many of the same arguments in the second round that he made in the first one. I have already responded to all of his criticisms made the first time around. Today I will respond only to Professor Caflisch's new criticisms, or at least his new twists on old criticisms, about each of the five regulations that he has challenged.

(a) *Stopping and registering*

5. The first of these regulations is the requirement that all vessels, Nicaraguan as well as Costa Rican, stop and register upon entering and exiting the protected area of the river. Professor Caflisch did not question Nicaragua's judgment that this regulation safeguards the environment, and deters and prevents criminal activity on or adjacent to the river[79]. Instead, he focused his criticism of this regulation on what he called Nicaragua's charges "for each and every journey a fee of US$5 plus a handling fee of US$2 for entering the country and another handling fee of US$2 for leaving it"[80]. He further complained that "it is a lot for the inhabitants of a poor area of Costa Rica whose daily lives depend on the river"[81]. I am afraid that Professor Caflisch has his facts wrong, and his regulations confused.

6. First, there are no charges for stopping and registering, and no fees for entry onto the river or for what he called "handling". The evidence is undisputed on this point. Professor Caflisch apparently has confused this regulation with a different one, concerning immigration, and which

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[78] CR, 2009/6, p. 42, para. 21.

[79] CR 2009/5, pp. 16-20, paras. 25-33.

[80] CR 2009/6, p. 43, para. 24.

[81] *Ibid.*

applies only to foreign tourists, who are required to purchase a tourist card whose cost is $5 and to pay a fee of $4 for the service of immigration processing[82]. The evidence is also undisputed that these requirements are not applied to local Costa Rican inhabitants, who are free to navigate on the river without acquiring tourist cards or passing through Nicaraguan immigration[83]. Whether poor or not, they do not pay any of these fees. Professor Caflisch's complaint about this regulation, then, is based on fees for stopping and registering which are not charged, and a burden on local residents that they do not bear.

(b) ***Inspection and departure clearance***

7. The second challenged regulation is the departure clearance certificate. Professor Caflisch did not question the evidence that the requirement to undergo an inspection and obtain a departure clearance certificate promotes navigational safety, and deters and prevents illegal trafficking in protected wildlife species, arms and drugs[84].

8. What Professor Caflisch *did* say about the departure clearance certificate is really quite unusual. He transformed himself from counsel and advocate in these proceedings to witness, and actually provided personal testimony in support of his own argument. Here are his words:

> "I have witnessed both the handling of the stopping and registering requirements and the inspection of the boats to check their seaworthiness and the identity of the cargo and passengers. I was unlucky; though a fee was paid, I saw no inspection of the boat. There was no service rendered for which a fee could be collected."[85]

It is not every day that counsel before this Court turn themselves into fact witnesses. That Professor Caflisch felt the need to do so suggests that Costa Rica's argument against this regulation is so devoid of real evidentiary support that counsel must himself try to fill the gap with his own personal testimony.

9. The evidence — the *real* evidence — shows that inspections are regularly performed, and departure clearance certificates are regularly issued, for a fee of $5 to cover the cost of the inspection. In fact, the *real* evidence, which was submitted by Costa Rica herself, in the form of

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[82] CR 2009/5, p. 25, para. 43.

[83] CR 2009/5, p. 24, para. 42; RN, Vol. I, paras. 4.88-4.89; RN, Vol. II, Anns. 70, 73, and 78.

[84] CR 2009/5, pp. 20-23, paras. 34-38; RN, pp. 198-199, 204-206, 208-209.

[85] CR 2009/6, p. 44, para. 25.

affidavits and publicly reported statements by Costa Rican nationals who navigated on the river, contradicts the anecdotal testimony provided by Professor Caflisch, and confirms that inspections are routinely performed and departure clearance certificates are issued for payment of a small fee[86]. Annex 101 of Costa Rica's Memorial in particular describes an inspection, in meticulous detail, of the Costa Rican witness's boat and cargo. The Memorial — the Memorial itself states: "Nicaragua required that all Costa Rican vessels stop at every Nicaraguan Army post along the river for inspection . . ."[87]

10. In fact, it was Costa Rica herself which urged Nicaragua to establish posts along the San Juan River to register and inspect passing vessels, and to issue departure clearance certificates. The Final Minutes of the 1997 meeting of the Binational Nicaragua-Costa Rica Commission recorded that, at Costa Rica's request,

> "It was agreed that Nicaragua will make efforts to establish posts at determined sites, so as to extend coverage in the fight against [drug trafficking] . . . With respect to the movement of vessels, it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case the posts at San Juan del Norte, San Carlos and Sarapiquí."[88]

11. In the first round, Professor Caflisch acknowledged that Costa Rica agreed to the registration and inspection of vessels, and the issuance of departure clearance certificates, at these posts in order to fight drug trafficking. This, of course, is alone sufficient to establish the reasonableness of the requirements[89]. In the second round, Professor Caflisch tried a new approach. This time, he said that the Minutes of the Binational Commission did not specify whether the agreed registration, inspection and departure clearance of vessels would be done in Nicaragua or Costa Rica[90]. I am afraid that Professor Caflisch has got the geography wrong again. [Slide PSR] Projected on the screen before you is a sketch-map from Nicaragua's Rejoinder showing the location of Nicaragua's posts on the river[91]. The fact that these posts are there is undisputed by Costa Rica. You will see the posts, indicated by the red triangles on the Nicaraguan

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[86] MCR, Vol. V, Ann. 116, p. 591; RCR, Vol. II, Ann. 54, p. 288.

[87] MCR, p. 35, para. 3.24.

[88] RN, Vol. II, Ann. 4, pp. 23-24.

[89] CR 2009/3, p. 29, para. 22.

[90] CR 2009/6, pp. 45-46, para. 30.

[91] RN, Vol. I, p. 190, sketch-map 7.

side, at the precise locations mentioned in the Minutes: San Juan del Norte, Boca San Carlos and Sarapiquí. Professor Caflisch might not know where they are, but Costa Rica does. As recorded by the Binational Commission: "Nicaragua will make efforts to establish posts at determined sites . . ." These are the sites. The same ones specified in those Minutes.

12. Professor Caflisch complains that Nicaragua has charged different amounts for the departure clearance inspection, and that this is arbitrary[92]. He displayed a certificate reflecting the payment of a $25 inspection fee and said that on other occasions Nicaragua has charged $5. This is true, but it is not arbitrary. The $25 certificate is dated May 2001[93]. Two months later, the Nicaraguan authorities issued a Plan of Action which, among other things, reduced the fee to $5 — largely in response to protests from Costa Rica — and the fee has remained at that level ever since[94]. Arbitrary it is not.

13. Professor Caflisch challenged my assertion, from last Friday, that local residents are not required to pay this fee. He said there were six affidavits from local residents, in four of which the witness declared that he paid the fee[95]. We read those affidavits and, again, Professor Caflisch shows he is unfamiliar with the geography of the area. Three of these four "damaging" affidavits are from residents of Barra del Colorado, which is situated not on the San Juan but on Costa Rica's Caribbean coast, far removed from the river[96]. These are not local residents. The fourth affidavit is from a retired tour boat operator[97]. Another affidavit, which is from a local resident, states that the neighbours in the area all carry "a courtesy departure clearance"[98]. The truth then, is exactly as published in Nicaragua's Plan of Action, issued in July 2001: "Costa Ricans whose domicile is located in the adjacent proximities shall be issued a courtesy departure clearance certificate . . ."[99].

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[92] CR, 2009/6, p. 44, para. 25.

[93] MCR, Ann. 241 *(b)*.

[94] RN, Ann. 48; See also MCR, Vol. 3, Ann. 72.

[95] CR, 2009/6, p. 44, para. 27.

[96] MCR, Vol. IV, Anns. 92 and 96; RCR, Vol. 2, Ann. 51.

[97] MCR, Vol. IV, Ann. 103.

[98] RCR, Vol. II, Ann. 50, p. 280.

[99] RN, Vol. II, Ann. 48, p. 306.

(c) *Night-time navigation*

14. The third challenged regulation is the prohibition on navigation after nightfall. Nicaragua has fully supported with evidence the justification for this regulation, which is navigational safety[100]. In particular, Nicaragua has supplied evidence of the real dangers associated with navigation after dark on this particular river[101]. Costa Rica has not offered any evidence to the contrary. Or, at least Costa Rica offered none until Monday when her star witness, Professor Caflisch, told the Court that the river had few obstacles and he did not find it to be so dangerous[102]. I am afraid that, in this regard, Professor Caflisch is in conflict with Costa Rica's own long-standing position on the dangers of navigation on the San Juan River, a position Costa Rica has held at least ever since she told President Cleveland in 1887: "it is well known that the navigation of the San Juan River encounters many obstacles, not only on account of its shallowness at certain places, but also owing to its rapids and other dangers"[103].

15. Professor Caflisch argued on Monday that, even if navigation on the river is dangerous, Nicaragua discriminates against Costa Rican navigation by permitting night-time navigation on the upper portion of the river, where Costa Rica enjoys no navigation rights, but not permitting it on the lower portion, where she has Treaty rights. This time, I must say, Professor Caflisch got his geography right. But, most unfortunately, there are other problems. In his speech on Monday, as reproduced in the *compte rendu*, he cited two different timetables for the same ferry service that operates on the upper portion of the river; the timetables were apparently downloaded from the Internet over the weekend, for the purpose of responding to my speech of last Friday[104]. One of the cited timetables, which is in your judges' folder, was not mentioned by Professor Caflisch on Monday. It shows that the ferry does not operate at night[105]. The other timetable, on which Professor Caflisch based his argument to the Court, and which he displayed, shows that it does[106].

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[100] RN, pp. 199-200, 209-211.

[101] *Ibid.*

[102] CR, 2009/6, p. 46, para. 31.

[103] RN, Vol. II, Ann. 5, pp. 160-161.

[104] CR 2009/6, p. 47, n. 150: http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp and http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html.

[105] See http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html.

[106] See http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp.

Since this is the same ferry service, one of Professor Caflisch's timetables has to be wrong. This alone raises doubts about the probative value of his evidence. So we investigated this further. After his speech, we contacted by email the travel agency whose timetable Professor Caflisch relied on, and asked if that timetable is correct. It turns out it is not, according to the correspondence we received back from the travel agency, which we would be happy to make available to the Court and to the Costa Rican side. There is no night-time navigation on the upper portion of the San Juan, just as there is no such navigation on the lower portion. There is no basis for any argument that Costa Rica has been discriminated against.

16. It is undeniable, and even Professor Caflisch denies it no longer, that the prohibition on night-time navigation on the lower San Juan is applicable equally to Nicaraguan and Costa Rican vessels. There is no evidence in the record, and no reason to believe, that Nicaragua would deprive herself of the ability to navigate at night on this portion of the river just to harass or make a political point to Costa Rica. To the contrary, Nicaragua's population centre at San Juan del Norte is only reachable by the river. It is cut off completely from the rest of Nicaragua and the outside world after dark, because of Nicaragua's prohibition on night-time navigation. By contrast, Costa Rica's sightseeing boats are only interested in transiting the river in the daytime, since the sights cannot be seen at night. Nicaragua is thus hurt more than Costa Rica by this regulation. Nevertheless, Nicaragua believes it is justified because of the danger to human life associated with night-time navigation on this river. When Professor Caflisch suggests that these dangers can be better addressed by requiring or installing lights on all vessels, or along the shore[107], he asks the Court — sitting here in The Hague and far removed from the San Juan River — to substitute its own judgment for that of Nicaragua and decide what measure is most appropriate and cost effective to ensure navigational safety on a river it has never seen. Surely that is not a role the Court wishes to play. The regulatory measure adopted by Nicaragua is demonstrably reasonable, and it does not discriminate against Costa Rica. The enquiry necessarily stops there.

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[107] CR 2009/3, p. 32, para. 26 (v).

(d) *Flying the flag*

17. The fourth regulation challenged by Professor Caflisch is the requirement that certain vessels fly the Nicaraguan flag while navigating on the river. Nicaragua only applies this requirement to the very few vessels that have masts or turrets[108], and there is no evidence that any Costa Rican vessel has ever been prohibited from navigating on the river because of a failure or refusal to fly the Nicaraguan flag. Does Coste Rica have evidence that any vessel was ever stopped from navigating because of failure to fly the flag? Professor Caflisch himself provided the answer: "Of course not . . ."[109] Then what is Costa Rica complaining about? Professor Caflisch agreed that flying the flag of the riparian sovereign is an accepted international custom[110]. Then how can he argue that Nicaragua's regulation requiring the same thing is "unreasonable"?

(e) *Visas*

18. The fifth and final regulation challenged by Costa Rica is the requirement that foreign nationals, including Costa Ricans, obtain a Nicaraguan visa before entering Nicaragua, including when they enter Nicaragua via the San Juan River. Professor Caflisch suggested that there was no justification for Nicaragua to require visas of persons operating or riding on tour boats because "boatmen and their passengers transit on the river without entering Nicaragua for any length of time"[111]. With respect, that misses the point in at least two ways. First, as a sovereign State, Nicaragua has the same right as every other State, in its discretion, to require foreign nationals, including their government officials, to obtain a valid visa before entering her territory, for whatever length of time, and it cannot be questioned that one enters Nicaragua when one enters the San Juan River. Second, many countries require visas even for very short stays; in the United States, for example, a visa is required even to transit through a United States airport from one international flight to another, without otherwise entering the country. And the tourist excursions along the San Juan implicate Nicaragua far more than that. [Slide PSR] The journey that Costa Rican tour boats make on the San Juan, with its dramatic views of flora and fauna native to

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[108] CR, 2009/5, p. 26, para. 45.

[109] CR, 2009/6, p. 8, para. 35.

[110] CR, 2009/6, p. 48, para. 36.

[111] CR 2009/6, p. 49, para. 40.

the river and the adjacent environmental reserves on the Nicaraguan side, is featured in advertising brochures distributed by Costa Rican tour operators:

> "Costa Rica, in particular San Juan, has a rich history [I note that here the San Juan is claimed to be part of Costa Rica] . . . We'll then take a ride to Siquirres, which is a bit of a jaunt, but well worth it for what comes next: a delightful glide down the San Juan River . . ."[112]

There are faster, cheaper and more comfortable means of transport between the Costa Rican interior and her Caribbean coastal resorts. The reason for the river tour is nature sightseeing, and the most attractive part of the voyage, according to the promotional literature of the Costa Rican tour operators, is along the San Juan[113]. That is why the tour boats linger there.

19. Professor Caflisch suggests that Nicaragua's visa requirement imposes a hardship on Costa Rica's boatmen, who allegedly cannot afford the fee. To be sure, nobody likes to pay for a visa, and nobody likes standing in a queue to get one. But that is true almost everywhere, and does not constitute a reason to deny Nicaragua her sovereign right to control her borders, or the entry of foreign nationals into her territory. Costa Rica does not allow any Nicaraguans into her territory without a visa.

20. Nicaragua, however, exempts local Costa Rican riparians from her visa requirements. Professor Caflisch said on Monday that this is not so, and cited affidavits from those he called "local riparians" who said that they had to get Nicaraguan visas to navigate on the river[114]. Well, we read the affidavits too. None was submitted by a local riparian or commercial boatman. All were signed by non-riparian tour boat operators, who are not exempt from the visa requirement[115].

21. Professor Caflisch painted the picture of a hypothetical Costa Rican tour boat operator, whom he said would be bankrupted by all of Nicaragua's fees. So much, he said, for what he rather sardonically called "Mr. Reichler's non-burdensome immigration regulations"[116]. I prefer not to deal in hypotheticals, but in evidence. The evidence, which Costa Rica has never denied, is that Costa Rica's tourism traffic on the San Juan River increased by more than 350 per cent

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[112] http://www.pedalandseaadventures.com/costa-rica-adventure.html.

[113] See e.g., *ibid.* and http://oasisnaturetours.com/gallery/index.html.

[114] CR 2009/6, p. 48, para. 38, n. 156.

[115] MCR, Anns. 85, 87, 91, 92, 93, 95 and 189; RCR, Anns. 51 and 52.

[116] CR 2009/6, p. 49, para. 39.

between 1998, when Costa Rica says Nicaragua first began to systematically deny her rights on the San Juan River, and 2004, the year before this lawsuit began[117]. That allows me to reply in kind to Professor Caflisch: so much for his *burdensome* immigration regulations.

22. Mr. President, the challenges that Costa Rica has made in the second round, to the reasonableness of Nicaragua's regulations, do not fare any better than the challenges that were made in the first round, or in the written pleadings. Costa Rica now accepts that Nicaragua has the right to regulate all navigation on the San Juan River, provided that her regulations are reasonable, non-arbitrary and non-discriminatory. Nicaragua has submitted evidence demonstrating the reasonableness of all five of her challenged regulations. Costa Rica has failed to prove that any of them is unreasonable, or to prove that they are arbitrary or discriminatory in any way. As a consequence, her challenges to all of them must fail.

2. The practice of the Parties

23. Mr. President, I will now respond to my good friend and renowned poultry farmer, Professor Crawford, and his remarks on the practice of the Parties with regard to navigation by Costa Rican public vessels.

24. What is most remarkable about Professor Crawford's presentation is his abandonment of ground long held sacred by Costa Rica. Until Monday, Costa Rica had argued throughout this case that the practice of the Parties with respect to navigation by police and other public vessels was of singular importance, and that it supported Costa Rica's reading into the 1858 Treaty and the Cleveland Award a right of navigation on the San Juan River for all of her public vessels. It came as quite a surprise to me, then, when I heard Professor Crawford say that the practice of the Parties with regard to this matter is now "entirely subordinate", and that it is of "less significance"[118]. While surprising, Professor Crawford's sudden turnabout is understandable, especially in light of the evidence that has been emphasized in these hearings. It appears that Costa Rica has come to the conclusion, during the oral proceedings, that the practice of the Parties is no longer helpful to her, and she has now chosen to distance herself from it. I could say, perhaps a bit metaphorically,

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[117] CR 2009/5, p. 25, para. 44.

[118] CR, 2009/6, p. 55, para. 14; p. 56, para. 16.

that, as regards the practice of the Parties, the Costa Rican army has fled the field of battle, except that, of course, as we all know, Costa Rica says she has no army. There can be no doubt, however, that, on this matter, her "Public Forces," or whatever she chooses to call them, have abandoned ship.

25. Professor Crawford spoke about navigation by three kinds of public vessels: revenue vessels, police vessels, and other government vessels. I will separately address each of these.

(a) *Revenue vessels*

26. I start with revenue vessels. The evidence does not show that Costa Rica has exercised her right to navigate on the San Juan River with these vessels. The point is not seriously challenged by Costa Rica. Nor could it be. She has presented only a handful of documents even purporting to show that she exercised her right to navigate on the river with revenue vessels in activities related to and connected with navigation "con objetos de comercio", and none of the documents states that any such navigation on the San Juan River actually took place[119]. Professor Crawford did nothing to refute this basic point. Bereft of any other documentary support, he called the Court's attention to a single report, dated 26 July 1968, and said that Nicaragua's argument can be "disproved by reference to only one example"[120]. Well, he had better say that, because one example is all he has. But even his lonely example proves nothing.

27. The report on which Professor Crawford relies says only that the revenue guards went from their base at Boca San Carlos to a place called Infiernito to carry out a mission[121]. It does not say that they travelled on the San Juan River to get there. Professor Crawford does not deny this. [Slide PSR] However, he projected a sketch-map on the screen, the same one that is now before you, pointed to the locations of Boca San Carlos and Infiernito, and said that the revenue guards' transit on the San Juan may be *inferred* because it takes much less time to travel between these points by boat; the route by automobile is long and circuitous; and, in the rainy season the roads are practically impassable[122].

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[119] MCR, para. 4.89, n. 234; RCR, Ann. 33, p. 245.

[120] CR 2009/5, p. 56, para. 17.

[121] RCR, Ann. 33, p. 245.

[122] *Ibid.*

28. Let us give him the benefit of the doubt and assume he is entitled to his inference. What would it prove? Only that there was one instance of navigation on the San Juan by Costa Rican revenue vessels. Between 1858 and today, there is no other report or official record of any other such navigation — that is, navigation on the San Juan by Costa Rican revenue vessels. The affidavits cited by Professor Crawford on Monday are not official reports or contemporaneous records, and they do not help him because they refer only to navigation by police vessels, not revenue vessels and the navigation they describe is unrelated to commerce, however that word is defined. The point is clear. Costa Rica could not have had a practice of navigating on the San Juan with her revenue vessels. If she had had one, there would be numerous official reports and records, and Costa Rica would have produced at least some of them.

29. The reason there was no such practice is also clear. There was never any commercial navigation on the San Juan that required the presence, operation or protection of Costa Rican revenue vessels, and this is what led Costa Rica to close all her customs posts on the San Juan, and even on the internal rivers that connect to the San Juan, many decades ago[123]. These facts were not challenged by Professor Crawford, nor could they be.

30. Nicaragua has never disagreed that, regardless of actual use, Costa Rica continues to enjoy the right to navigate that was specified by President Cleveland in the second paragraph of his Award. But it is important to be clear about what that right is. It is the right reflected in that paragraph to navigate with revenue vessels, and only with revenue vessels, when related to and connected with navigation "con objetos de comercio". It is not a right available to police or other government vessels; and it may not be exercised even by revenue vessels except in relation to and connected with navigation "con objetos de comercio".

(b) *Police vessels*

31. This leads me directly to the second group of Costa Rican vessels: police vessels. Here, Costa Rica makes a deliberate effort — and regrettably my friend Professor Crawford is one of the perpetrators — to confuse revenue vessels with police vessels. He would have the Court believe that the police have become revenue guards, and that their boats have become revenue vessels, so

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[123] CR 2009/5, p. 45, para. 9.

that police boats would enjoy the same rights as revenue vessels under the Cleveland Award. I respectfully submit that the Court should have none of it. The evidence does not support it. Costa Rica presented to the Court only two official police reports showing navigation by police vessels on the San Juan[124]. One of the documents, from 1992, describes a single voyage on the San Juan[125]. The purpose is not reported. There is certainly no mention of customs or revenue-related activity. The other document, which has now been discussed by counsel for both Parties, is a detailed report by a local police commander recording navigation on the San Juan River between 1994 and 1998[126]. It makes no mention — no mention whatsoever — of any police navigation related to revenue, customs or fiscal matters, and no mention of any navigation related to trade or commerce. This is because these were not, these were never, activities with which the police were ever concerned. Costa Rica has made no suggestion that her police posts on the San Juan are customs posts. They are not. The documents produced by Costa Rica thus refute her effort to assimilate police vessels to revenue vessels, because they show that the police have not performed, do not perform, revenue or customs-related activities. They demonstrate that — as Professor McCaffrey explained this morning — the right President Cleveland found for revenue vessels is limited to those vessels, and is not available to police vessels.

32. Professor Crawford made every effort to depict these police vessels as unthreatening and innocuous. He displayed a photograph of them with a smiling Costa Rican policeman in the foreground[127]. He referred to them especially as "humble" vessels[128]. Well, Mr. President, Members of the Court, there is nothing humble about these. [Slide PSR] Projected before you are the weapons carried by Costa Rican police officers on these "humble" vessels: M-16s and Galils, and the like[129]. This is not our photograph. It is Costa Rica's, and can be found in her Memorial[130]. The photograph, so helpfully supplied by Costa Rica, explains why, during the

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[124] CR 2009/5, pp. 46-47, paras. 11-12.

[125] RCR, Vol. 2, Ann. 38.

[126] MCR, Vol. VI, Ann. 227.

[127] Costa Rican judges' folders, Round Two, slide 65; MCR, Vol. I, pp. 78*bis* and 86*bis*.

[128] CR 2009/6, p. 56, para. 15.

[129] MCR, p. 84*bis*.

[130] MCR, p. 83*bis*.

period in the 1990s when Nicaragua authorized Costa Rican police vessels to navigate on the river for the purpose of resupplying their posts, she required that all weapons be stowed on the floor of the vessel, under supervision of a Nicaraguan soldier who was required to be on board.

33. In regard to this practice, the evidence shows that both Parties recognized that Costa Rica had no right to navigate on the river with police vessels, and that she could not do so without first seeking and obtaining Nicaragua's prior permission. The Court is, by now, quite familiar with the aide-memoire of July 2000 recording the statements of Costa Rica's Public Security Minister and the Ministry's International Legal Adviser to this effect[131]. Professor Crawford gave us no reason to disregard or disbelieve this contemporaneous official record of a high-level meeting between the two States, which was duly authenticated by its author. He took two shots at it. Missed with both. In the first one, he simply repeated what he said in the first round, that there is no evidence that Costa Rica received or approved the document[132]. Unlike love, his argument is not better the second time around! In fact, he admitted on Monday that Costa Rica received and took note of the document, as it surely could not have failed to do, in July 2008, when it was annexed to and discussed within Nicaragua's Rejoinder[133]. Yet, he offered no reason why Costa Rica submitted no affidavits or other documents refuting, or even mentioning, the aide-memoire or the statements contained therein. Surely if the damaging statements attributed to her Minister of Public Security and the Ministry's International Legal Adviser were inaccurate, Costa Rica would have submitted affidavits from these government officials to that effect. The inference, if not the conclusion, to be drawn is that affidavits were not supplied because they would not have been helpful to Costa Rica.

34. Professor Crawford's second shot at the aide-memoire is the affidavit of Colonel Walter Navarro, which is the only one Costa Rica submitted after the close of the written pleadings[134]. The Navarro affidavit makes no mention of the July 2000 meeting, no mention of the aide-memoire and no mention of the statements attributed in it to his senior officers. There is no denial that these statements were made. All Colonel Navarro says is that in his own meetings with

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[131] RN, Vol. II, Ann. 68.

[132] CR 2009/6, p. 59, para. 24.

[133] CR 2009/6, p. 59, para. 23.

[134] CR 2009/6, p. 59, para. 24.

Nicaraguan army officers, held after he assumed command of the Costa Rican police forces along the San Juan in May of 1998, no permission was sought for Costa Rican police vessels to navigate on the river. All this tells us is what we already know: that Colonel Navarro implemented a new policy between May and July of 1998, as part of which Costa Rica stopped requesting authorization from Nicaragua before navigating on the river, to which Nicaragua responded by prohibiting all further navigation by Costa Rican police vessels. Colonel Navarro's affidavit does not even address, let alone refute, the statements made by his superior officers two years later, in July of 2000, as recorded in the aide-memoire.

35. Now, Professor Crawford has attempted to call me to account on my use of the Costa Rican police report to show that, pursuant to the new policy implemented by Colonel Navarro, Costa Rica forcibly detained Nicaraguan nationals, ordered them to board her armed police vessels, and transported them on the river to her police posts. He claimed that I was wrong about this, and that the detained Nicaraguans were actually transported on land, not by boat[135]. Well, I would now like to call him back. Let us, for a moment, return to the sketch-map that Professor Crawford displayed on Monday. [Slide PSR] He used this, as I mentioned a few moments ago, to claim entitlement to an inference that, in travelling between Infiernito and Boca San Carlos in 1968, the Costa Rican forces used the river, even though the report in question does not say that. Now, Professor Crawford and I do agree that the police report that I cited on Friday says that the detained Nicaraguan nationals were transported between La Cureña and Boca San Carlos, both of which are depicted on the same map[136].

36. Unlike Professor Crawford, I make no request for a mere inference that the Costa Rican police travelled with their Nicaraguan detainees in tow by river rather than by road, because, unlike Professor Crawford, I can cite proof that they went by boat. The proof is actually supplied by Costa Rica herself, which has said, on *repeated* occasions in this case, that La Cureña is not reachable by land transport. Indeed, Costa Rica cited the inaccessibility of La Cureña by land as her reason for closing the post there after Nicaragua prohibited further police navigation on the

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[135] CR 2009/5, p. 56, para. 17.

[136] MCR, Vol. VI, Ann. 227, p. 963.

river[137]. Even in these oral proceedings, Professor Crawford *himself* declared that La Cureña was inaccessible by land: that is in CR 2009/3, page 18, paragraph 35. So how can Professor Crawford now argue that the Nicaraguans were transported from La Cureña to Boca San Carlos by land? I will show you. The original report, in Spanish of course, says that the detained Nicaraguans were transported in "movil 711"[138]. [Slide PSR] "Movil" in Spanish and in this context, means "mobile unit"[139]. But look how Costa Rica translated it into English in her annexes: "vehicle"[140]. [Slide PSR] Somebody on the Costa Rican side, through the miracle of modern translation, turned a boat into a car. Of course, Professor Crawford, who is not a Spanish speaker, would not have been aware of this linguistic gamesmanship.

(c) *Other public vessels*

37. I turn next and last to navigation with other government vessels. No argument was made by Professor Crawford that either the 1858 Treaty or the Cleveland Award created a right for Costa Rica to navigate on the San Juan River with her public vessels for the purpose of performing governmental services. Instead, his entire speech on Monday was devoted not to making a legal argument but solely to portraying Nicaragua as the "bad guy" in this case. We heard repeatedly from him that Nicaragua has "prohibited" or "prevented" Costa Rican government officials from delivering vital education, health and other social services[141].

38. In his attempt to support these charges, Professor Crawford relied on a number of affidavits from Costa Rican government officials and other interested parties. We have read them, and, even if taken at face value, they do not support his argument. But before turning to their contents, I would like to say a few words about how this Court might wish to treat them. Professor Crawford employs a double standard. For him, the five affidavits from Nicaraguan army commanders should be disregarded by the Court *because*, because they are affidavits from Nicaraguan army commanders[142]. No other reason is given. On the other hand, affidavits from

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[137] RCR, para. 3.94.

[138] MCR, Vol. VI, Ann. 227, p. 986.

[139] Larousse, *Gran Diccionario: Español-Ingles/Ingles-Español* (2d. ed., 2002), p. 493.

[140] MCR, Vol. VI, Ann. 227, p. 963.

[141] See, e.g., CR 2009/6, p. 60, para. 27; p. 61, para. 28.

[142] CR 2009/3, p. 18, para. 36; p. 51, para. 27.

Costa Rican government officials and workers should be given full faith and credit. Please forgive me if find something uneven about this attitude. Nicaragua asks only for equality of treatment. Either the affidavits submitted by both Parties are to be treated as "evidence", or none are.

39. The affidavits relied on by Professor Crawford do not show that Nicaragua prevented or prohibited Costa Rican government officials from navigating on the San Juan. The affidavits that report a prevention of navigation expressly refer to navigation in police vessels, after 1998, when Nicaragua stopped authorizing police vessels to navigate on the river. Only Costa Rican officials riding in police vessels would have been affected. By contrast, navigation by Costa Rican officials in privately-owned vessels has not been affected by the prohibition that is applicable only to police vessels. This includes transport-for-hire of Costa Rican officials by local boatmen in what Professor Crawford perhaps euphemistically referred to as "river taxis". Nicaragua has not prohibited or interfered with such transport; the affidavits cited by Professor Crawford do not state otherwise.

40. Professor Crawford expressly referred to the affidavit of Dr. Laura Navarro, as evidence that Nicaragua imposed "a prohibition . . . upon Costa Rican public workers . . . navigating the San Juan River"[143]. The affidavit reveals, however, that there was no Nicaraguan prohibition at all, merely a requirement that Costa Rican officials seek a Nicaraguan visa or other formal authorization before entering Nicaragua and travelling on the river[144]. Professor Crawford also did not mention that Dr. Navarro, far from being prohibited, was actually *given* authorization by Nicaragua to travel on the San Juan, and the written proof of this is in Annex 47 of Costa Rica's Reply. Dr. Ching, whose affidavit was also invoked by Professor Crawford, was likewise given authorization by Nicaragua to navigate on the San Juan[145].

41. Nicaragua has never had a policy of preventing or prohibiting navigation by Costa Rican civilian officials. The evidence shows that Nicaragua's practice has been to authorize such navigation, subject only to two requirements, whose reasonableness I discussed earlier: that the officials possess visas to enter Nicaragua and that the vessels stop and register at the Nicaraguan

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[143] CR 2009/6, p. 61, para. 27.

[144] RCR, Ann. 57.

[145] CMN, Ann. 53.

post upon entering and exiting the river. To be sure, as I previously acknowledged, there have been delays in the issuance of some visas, in a few cases lengthy delays, as Professor Crawford noted. But this is not internationally wrongful conduct. There can be no wrongfulness without violation of a right, and Costa Rican public officials do not have a right to a Nicaraguan visa, or to navigate on the San Juan in public vessels for the purpose of delivering governmental services. In any event, Costa Rica's evidence of delays in issuing visas is almost entirely from 2005 and 2006. By 2007, even she acknowledges, in her Reply, "Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate"[146].

42. Mr. President, I will conclude today, as Professor Crawford did on Monday, with fishing — just a few words. The Parties are now agreed that Costa Rica neither has nor claims a right of her nationals to engage in commercial or sport fishing[147]. It is Nicaragua's position that Costa Rica has also failed to prove the existence of either a customary or a treaty right to engage in subsistence fishing. Nevertheless, subsistence fishing in the San Juan River can easily be, and in practice is, carried out from the shore, and Nicaragua confirms that it is not, and has not been, her policy to prevent subsistence fishing from the right bank of the river by Costa Rican nationals. Costa Rica has demonstrated no need, for subsistence purposes, to fish by boat in the middle of this particular river. That is the method used by commercial fishermen, large and small. It is Nicaragua's *right* to prohibit this practice in her sovereign waters, which in this case are part of the environmentally protected areas of the San Juan River Wildlife Refuge and the San Juan River-Nicaragua Biosphere Reserve.

43. Mr. President, Members of the Court, this concludes my presentation. I thank you once again for your patience and your courtesy and I ask you now to call on the distinguished Agent of Nicaragua, Ambassador Carlos Argüello.

The PRESIDENT: Thank you, Mr. Paul Reichler, for your presentation. I now call His Excellency Dr. Carlos Argüello Gómez, the Agent of Nicaragua, to offer the Agent's speech and submissions.

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[146] RCR, para. 4.36.

[147] CR 2009/6, p. 63, para. 30.

Mr. ARGÜELLO:

1. Thank you, Mr. President, distinguished Members of the Court. This final presentation will first address the question of the remedies sought by both Parties and will conclude with the presentation of the Nicaraguan submissions.

1. Remedies sought by Costa Rica (Costa Rica's submissions)

2. Costa Rica has requested the Court to make a declaration on nine specific points that cover her rights of navigation on the San Juan River as understood by Costa Rica. She also requests the Court to declare that Nicaragua should cease and make reparation for all breaches of these alleged rights and, finally, that Nicaragua should give assurances that her future behaviour will be to the satisfaction of Costa Rica.

3. The nature and extent of the limited rights of navigation of Costa Rica on the San Juan River have been analysed by Nicaragua throughout the written pleadings and during these oral pleadings. The remedies sought by Costa Rica are simply based on a different interpretation of these rights and thus any response to the specific question of remedies cannot be separated from the main arguments developed throughout the pleadings of this case.

4. The few additional comments made during these oral pleadings by Professor Crawford under this specific heading of "Remedies" were addressed by Professor Pellet. No substantive content has been added to this issue during the second round of oral pleadings by Costa Rica. For this reason, I will only address this issue by way of summary with a short comment on each heading of Costa Rica's submissions. Before discussing each of the nine headings in particular it must be pointed out that the submissions, although seemingly the same as those in her Memorial and Reply, have in fact been modified by the assertions of Costa Rica's representatives during these hearings to the effect that Nicaragua has the right to regulate the navigation on the river and also the right to dredge the San Juan in accordance with the 1858 Treaty and the Cleveland Award.

5. The first submission of Costa Rica prays the Court to declare that Nicaragua is under "the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism". In so far as Costa Rica asks the Court to reiterate what the 1858 Treaty states, that is,

that the Court declare that Costa Rica may navigate freely "con objetos de comercio", this declaration would be unnecessary. Nothing would be served by a reiteration of the wording of Article VI of the Treaty. That is why Costa Rica seeks an interpretation of the Treaty that would equate the phrase of the authentic Spanish text "con objetos de comercio" with the English text of "purposes of commerce" and, furthermore, not satisfied with the way the English translation seems to inflate her rights, Costa Rica wants the Court to add to the 1858 text that this navigation "for purposes of commerce" includes "communication and the transportation of passengers and tourism". The right of navigation "con objetos de comercio" has now evolved in Costa Rica's view into an obligation to allow "*all* Costa Rican vessels" — that is, public and private — to navigate for purposes of commerce understood as covering any human activity. After writing "any human activity", I went back thinking that this might sound exaggerated but after renewed consideration I could not think of any human activity that is not covered by commerce in this blown-up interpretation that even includes communication.

6. The second declaration requested by Costa Rica is "the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the river". Nicaragua does not impose charges or fees for navigating on the river in accordance with the 1858 Treaty. There is no proof that Nicaragua has ever done so. Of course, the wording of Costa Rica's submission is studiously misleading. Nicaragua is obligated not to impose charges or fees for navigation "con objetos de comercio" and not simply for navigating on the river with any purpose whatsoever. And this is what Nicaragua has been doing as Mr. Reichler has just been explaining.

7. Next, Costa Rica requests the obligation from Nicaragua: "[T]he obligation not to require persons exercising the right of free navigation on the river to carry passports or obtain Nicaraguan visas." This submission has two points. One is that passengers should not have to carry passports. But the question would be, what other better method of identification could be substituted for this universal accepted method? Should Nicaragua ask them to have their birth certificate as an alternative means of identification? On the question of the need for a visa I would suggest that our Costa Rican colleagues attempt to enter and navigate, for example, the nearby Rhine River without any passports or visas. Of course, the comparison is not exact. The Rhine is an international river under multiple sovereignty whilst the San Juan is an entirely Nicaraguan river. Once on the

San Juan river the person is inside Nicaragua and can go anywhere in the Nicaraguan territory. Thus, if no visa is required to enter the river then there would be no immigration control for entering Nicaragua.

8. The other submission of Costa Rica is "the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the river". As a matter of principle, the sovereignty over the river gives Nicaragua the authority of the "sumo imperio" to order vessels to stop and be inspected on any part of the river which is after all Nicaraguan territory. Professor Caflisch is aware of this and has suggested[148] that in lieu of this procedure of stopping at the two or three Nicaraguan posts along the river, perhaps Nicaragua could increase its patrols on the river. Since these patrols naturally would have the right to stop and inspect, the suggestion of Professor Caflisch is a bit bizarre.

9. The next submission is "the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags". Again this is a question of the right of regulation which indisputably is an attribute solely of Nicaragua. As a point of comparison on this issue we might point out that the Costa Rican land border posts are closed at night. I could add by personal experience, since the field apparently is open to personal appreciations and reminiscences by counsel, that if you are travelling from Nicaragua to Costa Rica through this leg of the Pan American highway — the most important international highway of the Americas —, and you reach the border crossing at night, you have to find sleeping accommodation to wait for morning for the border post to open and get through. The reason given for this schedule at the land border crossing is that it is for the convenience of the personnel and also for reasons of security. These reasons are even more cogent in the semi-jungle reaches of a very dangerous river and yet these regulations on the river are portrayed as a form of harassment.

10. On the question of the use of the flag on the vessels, it must be recalled that 99 per cent of the river traffic consists of small boats in the nature of canoes that do not carry nor are they

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[148] CR 2009/3, p. 28, para. 20.

obliged to carry flags. The 1 per cent that normally proudly waves the Costa Rican flag is asked to fly the Nicaraguan flag.

11. The next Costa Rican submission is "the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments". This Costa Rican submission presumably is based on the last part of Article VI of the 1858 Treaty. The text of this Treaty does not stipulate that landing on any part of the river is free of charges. It clearly says that this landing will be without payment of duties or imposts. In Spanish, "sin cobrarse ninguna clase de impuestos". So even in 1858 any charges for services were not included in this mandate. But the whole question in the present day is moot. It is surprising that Costa Rica should claim this right on the basis of the 1858 Treaty which has been superseded by treaties well known to the Parties. Today there are no rights of landing anywhere along the river without payment of duties. If Costa Rica maintains this position then it should be published in all the media that anyone can land on any part of the river and unload cargo without paying duties. This would come as an enormous surprise in all of the Central American countries. If this were true, all commercial treaties from the last 100 years would not be applicable along the river. But this is all fantasy; any Nicaraguan who lands on the Costa Rican margin with or without merchandise should travel with his lawyer in order to get him out of jail.

12. The next submission refers to "the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of resupply and exchange of personnel of the border posts along the right bank of the river with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second Article of the Cleveland Award". This Costa Rican claim is not based on the 1858 Treaty since it gives no such rights to Costa Rica even by way of a hint. Besides, it has not crossed the Nicaraguan authorities' minds to request that hapless, army-less Costa Rica come to the military defence of the San Juan River.

13. The Cleveland Award is the only instrument that allows Costa Rica a form of navigation not limited to vessels "con objetos de comercio". But the Cleveland Award is absolutely clear in limiting this right to those "vessels of the revenue service related to and connected with her

enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment". The words added by President Cleveland are not a superfluous description of what a revenue vessel is supposed to do since their description is part of any dictionary definition. The only purpose of President Cleveland's use of the words is to make clear that this right of protection by revenue vessels is limited to the right of navigation for the purposes envisioned in the Treaty and does not extend to the maintenance of the whole security needs of the State of Costa Rica.

14. The next submission refers to "the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956". Nicaragua has always complied with the mandates of the 1858 Treaty and the Cleveland Award and needs no reminder of this obligation. The bilateral Agreement of 1956 is absolutely irrelevant to the issues before the Court and has been quietly laid to rest during these pleadings.

15. Then, the final submission is "the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes". Mr. Reichler has just addressed this point and I will limit myself to saying that as a question of rights, Nicaragua holds absolute title to any and all of the resources of the San Juan River. This has been recognized by Costa Rican counsel[149]. As a matter of humanity and good neighbourliness, Nicaragua has never stopped subsistence fishery from the Costa Rican margin of the river. Naturally, it is a question that has to be regulated because an undefined permission for subsistence fishery could easily be used to cover any type of fishing, including commercial fishing, in the special circumstances of the river where the type of fishing gear for one and the other might be confused.

16. With the preceding overview and comments on the substantive declarations requested by Costa Rica on the alleged violations of her rights by Nicaragua, any further rebuttal of Costa Rica's claims for reparation for these violations or of assurances of this respect by Nicaragua is unnecessary. The one claim cannot subsist without the other. But it could be added further that

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[149] CR 2009/3, p. 23, para. 7, *first* subpara. (Caflisch).

even those rights claimed by Costa Rica have not been demonstrated to have been prejudiced or denied by Nicaragua in the 150-year existence of the 1858 Treaty.

2. Declarations requested by Nicaragua

17. Mr. President, distinguished Members of the Court, in normal circumstances Nicaragua as respondent State would have limited its submissions to a request for the rejection of the Costa Rican claims. After consideration, the conclusion reached by Nicaragua is that the real objective of this case is to try to open up or loosen up the clear stipulations of the 1858 Treaty and the Cleveland Award. Today, Costa Rica has felt no embarrassment in emphasizing before the Court and public opinion its purported lack of an army and at the same time to request and insist on the demand that is at the origin of this litigation: that is, Costa Rica's alleged rights to navigate freely, not only with public vessels for any purpose, but also with armed public vessels. At the same time, Costa Rica is attempting to magnify the meaning of free navigation "con objetos de comercio" (with objects of commerce) to encompass any present-day human endeavour.

18. For this reason, Nicaragua decided to request of the Court a declaration reaffirming her sovereign rights and jurisdiction on certain concrete issues.

19. The first declaration requested is that Costa Rica is obliged to comply with the regulations for navigation and landing in the San Juan, imposed by Nicaraguan authorities, in particular related to matters of health and security. Nicaragua has never imposed arbitrary regulations and there is no evidence whatsoever provided by Costa Rica that this has ever been the case. In the course of the present proceedings, Costa Rica has clearly recognized Nicaragua's right to dictate these regulations[150] and the requested declaration will only reaffirm this obligation.

20. The second declaration requested is that Costa Rican vessels have to pay for any special services provided by Nicaragua in the use of the San Juan, either for navigation or landing on the Nicaraguan banks. The 1858 Treaty liberates Costa Rica from paying duties or taxes for navigation but does not include services provided. It is incontrovertible that Nicaragua has a right to charge

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[150] See, e.g., CR 2009/3, p. 22, para. 4 (Caflisch).

for these services in the same way as fees for special services are charged in all river navigation. Professor Caflisch[151] agrees that as a matter of principle Nicaragua has this right.

21. The third declaration is that Costa Rica has to comply with all reasonable charges for the modern improvement in the navigation of the river with respect to its situation in 1858. This declaration does not have the purpose of subjecting Costa Rica to charges for the normal maintenance of the river. The intent of this declaration is to make clear that the 1858 Treaty or the 1888 Cleveland Award did not provide Costa Rica with the free benefit of any and all such improvements including those that might imply the use of the Nicaraguan land territory that is not subject to any right of free navigation by Costa Rica.

22. The fourth declaration is that Costa Rica may only use the revenue service boats in the way stipulated by the Cleveland Award, that is, during and with special reference to actual transit of the merchandise authorized by the Treaty. The reason for this declaration or rather this request for a reaffirmation of what the Cleveland Award stipulates is that any decision by the Court must be at least as careful on this issue as was President Cleveland. The reason for the specific wording of the Cleveland Award on this question of the navigation has been explained a few minutes ago. We might add that if the limits on the right to navigate with these revenue vessels are not those set forth by the Cleveland Award, then in fact Costa Rica would *de facto* be able to navigate the river with heavily armed vessels by simply painting them with the name "revenue cutter".

23. The fifth declaration was to the effect that Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858, even if this affects the flow of water to other present-day recipients of this flow such as the Colorado River. Professor Crawford[152] has conceded in clear language Nicaragua's right to dredge the river in conformity with the stipulations of the 1858 Treaty and the Cleveland Award. This concession is in fact satisfactory to Nicaragua.

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[151] *Ibid.*, p. 28, para. 21.

[152] CR 2009/3, p. 68, para. 25, and CR 2009/6, p. 63, para. 31.

3. Summary statement

24. Mr. President, distinguished Members of the Court, having concluded the previous observations on the remedies sought by the Parties, I would continue with some final general comments.

A. Historical background

25. The historical background that led to the signing of the 1858 Treaty has been gone over repeatedly throughout the written and oral pleadings and we will spare the Court further iterations on this issue.

26. The circumstances of the conclusion of this Treaty in 1858 have also been explained in detail in our written pleadings. It was pointed out and contested by Professor Crawford that in my first presentation I had said that Nicaragua had signed this Treaty under a cloud of duress. Since this case is not about the validity of the 1858 Treaty but about its interpretation, the pertinence of the use of this word to characterize the context in which the Treaty of 1858 was signed is not relevant. But, under any other name, the facts speak for themselves. At the moment of signing the Treaty Nicaragua had just been devastated by a war against a foreign invader, General Walker. Costa Rica was occupying the San Juan River and had given an ultimatum to Nicaragua to surrender the fortifications of the San Juan. Nicaragua responded by declaring war on Costa Rica. It would seem unnecessary to recall that this war and this occupation were occurring inside Nicaragua and not Costa Rica. All this can be reviewed in the Nicaraguan Counter-Memorial[153]. Perhaps the best way to portray the events is by citing the Note sent by the Secretary of State of the United States, Mr. Lewis Cass, on 30 July 1857 to the special agent of the United States to Central America:

> "Reports have reached here . . . that the government of Costa Rica . . . intends to appropriate to itself portions of the Territory of Nicaragua . . . Such a design is so unjust in itself, in view of the circumstances . . . she would violate the solemn pledges given when she proposed to go to the aid of Nicaragua by attempting to convert this into a war of conquest."[154]

27. I am sure that State Secretary Cass would not have been surprised by my use of the word "duress" to characterize the situation under which Nicaragua found itself in that period.

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[153] Paras. 1.2.35-1.2.47.

[154] CMN, para. 1.2.42.

B. Interpretation of the 1858 Treaty

28. The main issue presently before the Court is the interpretation of a treaty entered into in 1858 by two Spanish-speaking nations. If this case had been before a tribunal of Spanish-speaking judges or arbitrators the insistence by Costa Rica in using an English translation of the text as the definitive version for interpreting the treaty would have been surprising. If we eliminate from the pleadings all reference by Costa Rica to the English text presented to President Cleveland from which the other English translations are derived, for example, that published in the British papers, there is very little argument on the plain Spanish text. If we start from the plain text in Spanish "libre navegacion . . . con objetos de comercio" and translate it literally into English we come up with the phrase "free navigation . . . with objects of commerce". The French version, which is a language closer to Spanish, would render it as "libre navigation . . . avec des objects de commerce". The only way that we could come up with the English translation of "purposes of commerce" or the French "aux fins du commerce" is if the Spanish text had used the very common everyday phrases of "con fines comerciales" or "con propositos comerciales" or even "con objetivos comerciales". It is as unusual in Spanish, to say the least, to express the meaning of the very common expression "con fines" or "con propositos comerciales" with the phrase "con objetos comerciales" just as it would be unusual to use the phrase "with objects of commerce" or "avec des objets de commerce" for the same purpose in English or French.

29. The text in Spanish is clear. But even conceding for argument that there were any doubts as to its meaning it would be surprising that in a treaty of limits the meaning would be construed in the most overreaching way against the sovereign State.

30. There is a word in the English language presently in vogue: "repurpose", which in practice applies to anything that was made or meant for one thing and is used for another. This in fact is what Costa Rica wants the Court to accomplish with the 1858 Treaty: to repurpose it to fit any type of navigation and, even more so, to fit any type of human activity on the river.

31. Mr. President, distinguished Members of the Court, I will now proceed to read the submissions of Nicaragua.

On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings, may it please the Court to adjudge and declare that: the request of

Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

(a) Either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua.

(b) Or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings.

32. Before concluding this statement, we wish to most sincerely thank you, Mr. President and distinguished Members of the Court, for your kind attention and patience with our pleadings. Our special thanks also to the Registry for its expert and always welcome assistance as well as to the translators and interpreters.

33. Mr. President, distinguished Members of the Court, Nicaragua would conclude this presentation by reiterating her traditional and unwavering respect for the decisions of this highest world tribunal. We are certain that the Court's judgment will be a turning point for the better in the history of the relations of Nicaragua and Costa Rica. Thank you.

The PRESIDENT: I thank His Excellency Ambassador Argüello Gómez. The Court takes note of the final submissions which the Ambassador, the Agent of Nicaragua, has just read on behalf of the Republic of Nicaragua, as it took note of the final submissions of the Republic of Costa Rica on Monday 9 March. There are a few questions to put to the Parties from some Members of the Court. I shall now give the floor to Judges Koroma, Keith and Bennouna, who have questions for the Parties. First, I call upon Judge Koroma, if you please.

Judge KOROMA: Thank you. I wish to assure the Parties that I am not oblivious to possible archival constraints on their part, because of historical reasons. I will, however, appreciate it if they could answer the following question. Can either Party provide evidence as to whether Costa Rican locals and immigrants used the San Juan River in the period around 1858, when the

Treaty of Limits was concluded, and can either Party provide evidence as to the nature and scope of the subsequent practice in the use of the river by Costa Rican locals and immigrants? Thank you.

The PRESIDENT: Thank you, Judge Koroma. Next, I call upon Judge Keith, if you please.

Judge KEITH: Thank you, Mr. President. This is a question for both Parties. On the assumption that Costa Rica's right of navigation under Article VI of the 1858 Treaty does extend to the carriage of passengers, must the passengers or someone on their behalf make a payment for the carriage to the operator of the vessel for the carriage to fall within that right? I appreciate, of course, that Nicaragua rejects the assumption on which the question is based. Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Keith. Finally, I call upon Judge Bennouna. You have the floor.

M. le juge BENNOUNA : Merci, Monsieur le président. Ma question s'adresse également aux deux Parties. C'est donc la question suivante. Lorsqu'il a adopté des mesures pour la régulation de la navigation sur le fleuve San Juan, le Nicaragua a-t-il chaque fois informé et/ou consulté, au préalable, le Costa Rica ? Comme je dispose, Monsieur le président, du texte en anglais de cette question, vous me permettrez aussi de la lire en anglais, peut-être pour satisfaire à ce qu'on pourrait appeler l'égalité de traitement dans l'écoute en direct de la question. Je ne garantis pas par contre l'égalité de l'accent avec lequel la question sera prononcée. When it adopted measures for the regulation of navigation on the San Juan River, did Nicaragua, each time, inform and/or consult Costa Rica in advance? Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you, Judge Bennouna. The precise text of these three questions will be sent, in written form, to the Parties as soon as possible. In accordance with the usual practice, the Parties are invited to provide their written replies to the questions not later than 6 p.m. on Thursday 19 March 2009. Any comments a Party may wish to make, in accordance with Article 72 of the Rules of Court, on the replies by the other Party must be submitted no later than 6 p.m. on Thursday 26 March 2009.

This brings us to the end of the two weeks of hearings devoted to the oral arguments in this case. I should like to thank the Agents, counsel and advocates of the two Parties for their statements during these last two weeks. In accordance with the usual practice I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require.

With this proviso, I now declare closed the oral proceedings in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its judgment.

As the Court has no other business before it today, the sitting is now closed.

The Court rose at 1.10 p.m.

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